91-1367

No. ———

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DAVID A. STURMAN,
Petitioner,

v.

UNITED STATES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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122

QUESTIONS PRESENTED

1. Do the Fifth Amendment and Article III permit the taking of testimony for a federal felony trial to be conducted and controlled according to Swiss procedure, by a Swiss prosecutor who had previously arrested and interrogated one of the defendants, had interrogated one of the witnesses, and had helped obtain evidence for the prosecution?

2. Do Rule 15 of the Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments permit, as "former testimony" evidence in a federal criminal trial, a Swiss prosecutor's summary of testimony of unsworn witnesses in which cross-examination was limited to questions put by him, and the witnesses were allowed to consult their counsel while testifying and later to amend their answers?

LIST OF PARTIES

The parties to the proceeding in the Court of Appeals were David A. Sturman, Ralph L. Levine, Reuben Sturman and Melvin Kaminsky as appellants, and the United States as appellee.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED	2
STATEMENT	2
A. The Motion To Take Evidence Abroad	3
B. The Proposal To Follow Swiss Procedure	4
C. The Requested Procedure	5
D. Additional Changes	7
E. The Proceeding in Switzerland	9
F. The Summaries Become Evidence	11
G. The Court of Appeals' Decision	14
REASONS FOR GRANTING THE WRIT	15
I. THIS COURT HAS RECOGNIZED AS A "SUBSTANTIAL QUESTION" WHETHER AN ARTICLE III JUDGE MUST PRESIDE AT ALL CRITICAL STAGES OF A FEDERAL FELONY PROSECUTION, AND HAS HELD THAT THE JUDGE MUST CONTROL THEM	19
II. THE DECISION IGNORES THIS COURT'S HOLDINGS THAT DUE PROCESS REQUIRES A DISINTERESTED JUDGE	21

TABLE OF CONTENTS—Continued

	Page
III. THE CIRCUITS ARE IN CONFICT IN APPLYING RULE 15	22
IV. THE DECISION CONFLICTS WITH FIFTH AND SIXTH AMENDMENT DECISIONS OF THIS COURT	24
A. The Fifth and Sixth Amendment Right To Conduct Cross-Examination	24
B. The Prohibition of Trial by Affidavit	25
C. The Prohibition of Unsworn Witnesses	28
V. THE ISSUES ARE IMPORTANT	29
CONCLUSION	30
APPENDICES	
A. Opinion of the Court of Appeals (Oct. 24, 1991)	1a
B. Order of the District Court (Aug. 25, 1988)	43a
C. Order of the District Court (Feb. 9, 1989)	44a
D. Order of the District Court (Mar. 20, 1989)	45a
E. Oral Opinion of the District Court (April 25, 1989)	46a
F. Order of the District Court (May 4, 1989)	48a
G. Order of the District Court (May 5, 1989)	51a
H. Oral Opinion of the District Court (Oct. 24, 1989)	52a
I. Judgment of the District Court (Feb. 15, 1990)	56a
J. Order of the Court of Appeals denying rehearing (Jan. 8, 1992)	58a
K. Constitutional and Other Provisions	59a

TABLE OF AUTHORITIES

Cases: Page

Barber v. *Page*, 390 U.S. 719 (1968) 25
Bridges v. *Wixon*, 326 U.S. 135 (1945) 28
California v. *Green*, 399 U.S. 149 (1970) 26, 27
CFTC v. *Schor*, 478 U.S. 833 (1986) 20
City of Pittsburgh v. *Simmons*, 729 F.2d 953 (3d Cir. 1984) 28
Coy v. *Iowa*, 487 U.S. 1012 (1988) 6, 17, 24, 25, 27
Davis v. *Alaska*, 415 U.S. 308 (1974) 24
Douglas v. *Alabama*, 380 U.S. 415 (1965) 24
Edwards v. *United States*, 374 F.2d 24 (10th Cir. 1966), *cert. denied*, 389 U.S. 850 (1967) 28
Geras v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984) 20
Gerstein v. *Pugh*, 420 U.S. 103 (1975) 22
Gomez v. *United States*, 490 U.S. 858 (1989) 19, 22
Hardy v. *United States*, 375 U.S. 277 (1964) 20, 26
Idaho v. *Wright*, 110 S. Ct. 3139 (1990) 25, 26
Johnson v. *Zerbst*, 304 U.S. 458 (1938) 25
Kallen v. *Nexus Corp.*, 54 F.R.D. 610 (N.D. Ill. 1972) 27
Maryland v. *Craig*, 110 S. Ct. 3157 (1990) 24, 26
Mattox v. *United States*, 156 U.S. 237 (1895) 27
In re Murchison, 349 U.S. 133 (1955) 22
National Farmers' Organization, Inc. v. *Oliver*, 530 F.2d 815 (8th Cir. 1976) 28
Ohio v. *Roberts*, 448 U.S. 56 (1980) 26
In re Oliver, 333 U.S. 257 (1948) 24
Pennsylvania v. *Ritchie*, 480 U.S. 39 (1987) 24
Peretz v. *United States*, 111 S. Ct. 2661 (1991) 19
Perry v. *Leeke*, 488 U.S. 272 (1989) 25
Pointer v. *Texas*, 380 U.S. 400 (1965) 24
Tumey v. *Ohio*, 273 U.S. 510 (1927) 22
United States v. *Block*, 88 F.2d 618 (2d Cir.), *cert. denied*, 301 U.S. 690 (1937) 28
United States v. *Casamento*, 887 F.2d 1141 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990) 15, 17, 20, 23, 24, 29
United States v. *France*, 886 F.2d 223 (9th Cir. 1989), *aff'd by an equally divided Court*, 111 S. Ct. 805 (1991) 19

TABLE OF AUTHORITIES—Continued

Page

United States v. *Gifford*, 892 F.2d 263 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 3243 (1990) 17, 19, 20, 23
United States v. *Gifford*, 684 F. Supp. 125 (E.D. Pa. 1988), *aff'd*, 892 F.2d 263 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 3243 (1990) 29
United States v. *Johnpoll*, 739 F.2d 702 (2d Cir.), *cert. denied*, 469 U.S. 1075 (1984) 17
United States v. *Kelly*, 892 F.2d 255 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 3243 (1990) 20, 23, 24
United States v. *King*, 552 F.2d 833 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977) 16, 17, 23, 29
United States v. *Morlang*, 531 F.2d 183 (4th Cir. (1975) 28
United States v. *Raddatz*, 447 U.S. 667 (1980) 19
United States v. *Salim*, 855 F.2d 944 (2d Cir. 1988) 12, 14, 23, 24, 29, 30
United States v. *Selva*, 559 F.2d 1303 (5th Cir. 1977) 28
United States v. *Sines*, 761 F.2d 1434 (9th Cir. 1985) 17, 23
United States v. *Singleton*, 460 F.2d 1148 (2d Cir. 1972), *cert. denied*, 410 U.S. 984 (1973) 16
United States v. *Will*, 449 U.S. 200 (1980) 22
United States v. *Wilson*, 601 F.2d 95 (3d Cir. 1979) 23
Ward v. *Village of Monroeville*, 409 U.S. 57 (1972) 22
White v. *Illinois*, 112 S. Ct. 736 (1992) 26

Constitutional Provisions:

U.S. Constitution, Article III 2, 7, 18, 19-21, 22, 30
Fifth Amendment 2, 18, 21, 24
Sixth Amendment 2, 3, 6, 18, 24, 26, 27

Statutes:

Court Reporters Act, 28 U.S.C. § 753 ..... 2, 27, 28
Federal Rules of Criminal Procedure Amendments Act of 1975, § 3, 89 Stat. 370, 373 16
Organized Crime Control Act of 1970, § 601(a), 84 Stat. 922, 934 16

TABLE OF AUTHORITIES—Continued

Page

18 U.S.C. § 371 2
18 U.S.C. § 3503 16
28 U.S.C. § 636 19
28 U.S.C. § 1254 2
28 U.S.C. § 1746 29

Treaty:

Treaty between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, 27 U.S.T. 2019, T.I.A.S. 8302 (1973) 2, 5, 15, 17, 29

Rules:

Federal Rules of Civil Procedure, Rule 28 ..... 2, 14, 22, 27
Rule 30 ..... 2, 27, 28
Federal Rules of Criminal Procedure, Rule 15 ..... 2, *passim*
Federal Rules of Evidence, Rule 603 ..... 2, 29
Rule 804 ..... 2, 11, 14, 26, 27

Miscellaneous:

Brief for the United States, *United States* v. *Badalamenti, et al.*, No. 87-1294, U.S. Ct. Apps., 2d Cir. (Dec. 5, 1988) 23

LANGENSCHEIDT'S ENCYCLOPAEDIC DICTIONARY OF THE ENGLISH AND GERMAN LANGUAGES (O. Springer ed. 1974) 21

Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 52 F.R.D. 409 (1971) 16

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case October 24, 1991.

OPINIONS BELOW

The oral opinions of the District Court ordering testimony to be taken in Switzerland and admitting summaries of that testimony into evidence are unreported. They appear in the Appendix at A. 46a and 52a.[1] The opinion of the Court of Appeals is reported at 951 F.2d 1466 and appears at A. 1a. The pertinent portion of that opinion is at A. 20a-24a.

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[1] References to "A." are to the appendix to this petition. References to "T." are to the transcript of proceedings in the District Court, "G.M." or "G.R." respectively to motions and memoranda or responses filed by the government in that court, and "D.M." to motions and memoranda filed by defendants.

JURISDICTION

The judgment of the District Court was entered February 15, 1990. A. 56a. The opinion and judgment of the Court of Appeals were entered October 24, 1991. A. 1a. A timely petition for rehearing was filed November 7, 1991 and was denied by the Court of Appeals January 8, 1992. A. 58a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

Article III and the Fifth and Sixth Amendments to the Constitution of the United States, 28 U.S.C. § 753, Rules 28 and 30 of the Federal Rules of Civil Procedure, Rule 15 of the Federal Rules of Criminal Procedure, Rules 603 and 804 of the Federal Rules of Evidence, and the Treaty with Switzerland on Mutual Assistance in Criminal Matters are reproduced in full or in pertinent part at Appendix K, A. 59a, *infra*.

STATEMENT

Petitioner, a United States citizen, was indicted in the United States District Court for the Northern District of Ohio on one count of conspiring with his father and others to defraud the United States (18 U.S.C. § 371) by helping to conceal his father's taxable assets. The indictment alleged that, in a conspiracy that began when petitioner was sixteen years old, petitioner had opened and maintained bank accounts in Switzerland for his father under his own and other names and helped his father move assets from one Swiss account to another. Petitioner was convicted of that one count and sentenced to a $10,000 fine and four years' imprisonment. A. 56a.[2]

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[2] His father was convicted of the same offense and also of fifteen counts of substantive violations of the Internal Revenue Code and related offenses.

A. The Motion To Take Evidence Abroad.

Soon after the indictment, the government moved the District Court for an order pursuant to Rule 15, Fed. R. Crim. P., to take in Switzerland as evidence the testimony of five Swiss nationals who it said had agreed to be "interviewed formally" in Switzerland with "a verbatim transcript of the interview," but who refused to come to the United States to testify at the trial. Rule 15 allows the government to obtain orders to take depositions for evidence in criminal trials in "exceptional circumstances" when "in the interest of justice," and requires that such depositions be "taken and filed in the manner provided in civil actions," except that "the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself." See A. 71a.

The government told the court that these witnesses, employees of Zürich banks, were "material witnesses" who would provide evidence as to "which defendants participated in the opening of accounts, which defendants engaged in transactions involving the accounts . . . . one of the most critical issues in this case." The government explained that:

> "the government contemplates a procedure at which all the parties, the Court or a special master, a stenographic reporter designated by the Court, a translator designated by the Court, a Swiss magistrate and the witnesses would gather in Zurich, Switzerland for the taking of the depositions. Pursuant to Rule 15(d) of the *Federal Rules of Criminal Procedure*, the defendants' Sixth Amendment right to confrontation will be fully respected." G.M. 2-12-86 at 1-2 (emphasis in original).

Petitioner opposed the motion, and further pointed out that "Rule 15 requires . . . . a full United States criminal trial type of cross examination," with "oral question and answer." The government asked "that the Court order

the conditions under which the depositions will take place." G.M. 8-12-85 at 4.[3]

B. The Proposal To Follow Swiss Procedure.

Before the court ruled, however, the government altered its position and told the District Court that the court could not order those conditions:

> "[T]he government does not believe that a United States District Court has the power to command the Swiss government or a Swiss Magistrate to conduct depositions in any particular fashion . . . ." G.R. 4-8-86 at 4.

Nevertheless, it said, its request should be granted because the testimony was sought for "one of the most critical issues in this case," G.R. 4-9-86 at 3, and "it is critical that we go to Switzerland to obtain that evidence." T. 11-6-87 at 19. It told the District Court that

> "while we can recommend to the Swiss certain procedures, we cannot dictate. And we will have to accept whatever they do, and then it will be for the parties to argue to your Honor whether or not what has been in fact done is of sufficient call [*sic*] to justify its admission at the time of trial." T. 11-6-87 at 23.

Petitioner objected that "there should be a court requirement that the Swiss government be advised and consent to and the witnesses be advised and consent to a United States criminal trial-type of cross-examination," and that "if the Swiss government or the witnesses refuse to permit that type of cross-examination then the depositions should not be allowed at all." *Id.* The government responded that "under the treaty, those depositions are

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[3] The government "request[ed] that the deposition be stenographically recorded as well as videotaped," because "[i]n the government's view, a videotape deposition would best preserve the opportunity for the jurors to observe the demeanor of witnesses." G. M. 8-12-85 at 3, 4.

conducted by a magistrate of the Swiss, a Swiss magistrate," and that the procedure to be followed "will be dependent upon the individual magistrate" and "[w]e won't know . . . until we get there." *Id.* at 21, 24.

The District Court said it was reluctant to order the parties to Switzerland for taking of testimony that might be inadmissible. The court observed that

> "The procedure in Switzerland certainly is a lot different than the legal system here. And certainly defense counsel have a right to cross examine—not to cross examine through some magistrate, but to cross examine witnesses." *Id.* at 24.

The government suggested that an appropriate procedure be proposed to the Swiss. The court agreed, even though "I see problems with this." *Id.* at 24-25.

C. The Requested Procedure.

The government thereafter announced to the District Court that "the depositions may have to be conducted in accordance with cantonal practice in Zurich, Switzerland."[4] It assured the court that "defense questioning [would] be permitted in accordance with the procedures of the requested state (*i.e.*, Zurich, Switzerland)," although it added, in a footnote, that "the government has no way of knowing the degree to which an examining magistrate in Zurich will permit counsel personally to cross-examine." G.M. 12-31-87 at 2, 3 n.3.

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[4] It said that this was contemplated by the treaty with Switzerland on Mutual Assistance in Criminal Matters, 27 U.S.T. 2019, T.I.A.S. 8302 (1973), which provides in Article 1 that the two countries undertake "to afford each other, in accordance with the provisions of this Treaty, mutual assistance in: a. investigations or court proceedings . . . ." A. 77a. The treaty provides in Article 12, § 4, that

> "Any person whose presence is permitted . . . shall have, in accordance with the procedures of the requested State, the right to ask questions which are not improper under the laws of either State." A. 81a.

The government then offered a draft letter it proposed to send to the Swiss, and explained to the District Court that:

> "The requested deposition procedures will fully protect the defendants' Sixth Amendment rights. *The proposed submission requests that the deponents be questioned under oath, that a translator be present, that a verbatim transcript be made by an American court reporter, that an American judicial official be permitted to attend . . .*" *Id.* at 1 (emphasis supplied).

Petitioner joined in objecting to the government's proposed request because it would "allow the magistrate himself to conduct the examination," and this "guts any meaningful opportunity for cross-examination required by the Sixth Amendment." He pointed out that the government did not represent that it had made any effort to persuade the Swiss to allow the testimony to be taken in compliance with Rule 15, although the Swiss in the past when pressed had waived their usual procedures to permit observance of the Rule in such situations. The defendants insisted that they were entitled "to have a face-to-face questioning" and not a system where "some magistrate would ask the questions." They cited this Court's decision in *Coy* v. *Iowa*, 487 U.S. 1012 (1988). The government replied that although "the Zurich code would govern the proceedings," questioning by a magistrate would be sufficient, adding that "whether or not there is a change as a result of this recent Supreme Court decision is anyone's guess because we are basically arguing here on new ground." T. 8-23-88 at 14, 12-12-88 at 3.

The defendants also urged as "very fundamental" that due process required the District Judge "to conform those proceedings as closely as possible to those that would take place in your courtroom" and "to have rulings from the Court based upon the objections that we would make in an American court." T. 8-23-88 at 4, 6. They asked specifically

> "that the submission request that Judge White preside over the depositions. Although the Swiss may wish to have a cantonal magistrate present . . . defendant is constitutionally entitled to have a judge of an Article III court preside over his criminal proceedings." D.M. 2-1-88 at 5.

The government's response was that "[t]his argument is ludicrous," and that because civil discovery depositions usually occur with rulings reserved and no judge present, nothing prevented evidence for a criminal trial being taken according to the rulings of a Swiss "magistrate."[5] The District Court approved the government's letter and said that "instead of the Court going, Mr. Jeffrey Lichtman, my law clerk, will go. Any questions that come up from counsel, he will answer those questions." T. 8-23-88 at 15-16; see A. 51a.

D. Additional Changes.

After delay while a Swiss court considered objections to the request, see A. 44a, the District Court commented that "I am getting to the place in this case that I am not going to let the Swiss Government tell me how to try this case, I guess." T. 12-12-88 at 2. But the government reiterated that the testimony of the Swiss witnesses was "critical" to "one of the most important issues in the case," "critical information," "very important testimony," the denial of which would "put[] the Government at a substantial disadvantage." T. 12-12-18 at 8, 10, 24, 26, 27. The government attorney explained that "I would need time to review the case before I could say that we could proceed without it definitely." *Id.* at 24. When the District Court pressed, "is this something that if you don't have it you can't present your case?" the government replied,

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[5] The government invited the Judge to be present and acknowledged that "certainly your Honor would have a degree of persuasiveness with the magistrate in Switzerland that any mere party would not have;" however, it told the Judge that his presence "is not strictly required." T. 8-23-88 at 8.

> "This is critical evidence . . . which can only be done by way of deposition after indictment. . . . It is clear since day one that the depositions were an important element in our case. . . . Could we go forward, your Honor? Can the Government--that's like saying, can you play the game with one arm and one leg?" *Id.* at 25-27.

The District Court said that it would like to discuss the forthcoming event by telephone with the Swiss "magistrate" to whom the government had often referred. Instead, the government arranged for the court to speak with an officer of the Swiss Federal Office for Police Matters, who told the court that "The Office of International Affairs [of the U.S. Department of Justice], if they ask to establish a verbatim transcript, we will do that, but it will have to be in German because English is not an official language." T. 12-19-88 at 11. The government subsequently presented the District Court with a new assurance:

> "MR. JIGGER: It's my understanding that the Swiss do not allow the Court Reporter. *It will be taken down by a Swiss Court Reporter in German and then the transcript will be provided.*" A. 47a (emphasis supplied).

The District Court then ordered "depositions" to be taken in Switzerland. A. 48a. It told defense counsel:

> "If I feel the [Swiss] Magistrate has given you every right that you were entitled to, and that the testimony should be heard, then I'll make that decision.
>
> "But I'll reach that bridge when I get to it. Take advantage of everything you can take advantage of at this point. That's the only thing I can tell you." A. 47a.

Objection was made again to "this strange procedure" in light of "Criminal Rule 15, which says, that a deposition should proceed as if the witness were testifying at

trial." T. 4-25-89 at 25. The District Court responded to the defense attorneys that its order "doesn't preclude you from contacting the Magistrate to see what he is going to allow," and suggested that they "Do the best you can." *Id.* at 28-29.

E. The Proceeding in Switzerland.

The "interviews" or "depositions," as the government's motion variously called them, did not take place before a "magistrate" as that term is used in the United States. They were conducted by Herr Benedikt Holdener, the *Bezirksanwalt*, or "District Attorney," of Zürich. The Zürich District Attorney is a prosecutor who, under the Swiss inquisitorial system, has power to investigate and summon witnesses for interrogation.

The defendants were permitted to attend. Petitioner attended through his American and Swiss attorneys. The entire proceeding was in German. An official Swiss translator at intervals summarized in English some, but not all, of what was said. T. 4214, 4216, 4219, 4221, 4223. The defendants' Swiss attorneys also attempted to translate, as did one American interpreter.

Petitioner objected both in Zürich and in the District Court to Herr Holdener's presiding because, as *Bezirksanwalt*, Herr Holdener was in fact a prosecutor. Petitioner further objected on grounds of personal bias because on a previous occasion Herr Holdener, after a communication from the U.S. Justice Department, had ordered the arrest of and personally interrogated petitioner's father, who was a codefendant. Herr Holdener also had cooperated with the U.S. prosecutors in their investigation by obtaining and furnishing evidence to be used against petitioner. In addition, one of the witnesses summoned to testify had previously been interrogated personally by Herr Holdener acting in his role as the prosecutor investigating this case. T. 4467.

Herr Holdener rejected all objections based on bias and conflict of interest, ruling that under Zürich law "there

exists no cause for preclusion or challenge." He announced that he would decide the procedure for the testimony. He rejected the defendants' requests for a stenographic transcript, and in fact subsequently threatened to prosecute criminally a U.S. court reporter whom the District Court had sent, A. 51a, if she atttempted to make a stenographic record of what she heard in English. T. 4212. He also announced that the witnesses would not be sworn, but instead would be warned about the Swiss penalties for false statements.

Four witnesses testified. They were not required to and did not take an oath or promise to tell the truth. The attorneys were not allowed to question the witnesses directly. Instead, all questions or areas of inquiry were submitted to the *Bezirksanwalt*, who phrased them as he saw fit and questioned the witnesses in German. T. 4216, 4221, 4224, 4235. He often added questions and comments of his own. T. 4222-23. Petitioner's counsel, having objected, declined to have Herr Holdener conduct cross-examination for him. One defense counsel did submit questions, which were asked in some form by Herr Holdener except for one, which he ruled inappropriate. At times Herr Holdener entertained and ruled upon objections; at other times he told the attorneys they would have to submit them later in writing. T. 4214, 4219, 4225.[6]

The witnesses were allowed to and frequently did consult their own counsel before answering. T. 4221. Herr Holdener on several occasions argued with witnesses about their answers, making no record of such colloquies or of the witnesses' initial responses. T. 4221-23.

Testimony was taken for four days, each beginning at 8:30 or 9:00 a.m. and ending after 5:00 p.m. Witnesses

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[6] Written submissions were tendered that objected to, *inter alia*, bias of the presiding officer, lack of a verbatim transcript, allowing the witnesses to confer with their attorneys, absence of an oath, questioning by the *Bezirksanwalt*, and "to district attorney Holdener ruling on the admissibility of questions, their relevancy and materiality." All objections were overruled by Herr Holdener.

testified that petitioner had personally come to them and opened accounts in various names, they identified and explained exhibits, and one also pointed out petitioner's father as a person they recognized who had signature authority and used an alias. *E.g.*, T. 4449-51, 4454, 4432-33.

The only record of the testimony was a summary dictated by Herr Holdener himself. From time to time he would walk over to and stand behind a police detective, who was seated at a typewriter. The detective then typed what Herr Holdener dictated, which was usually in the form of a single question and answer, even though sometimes there had been several questions and answers and interchange with the witness' attorney. T. 4213, 4222-23. The *Bezirksanwalt*'s dictated summaries of the four days of testimony consisted of 78 partly-filled typed pages.

A number of post-testimony additions, changes and deletions to the dictated summaries were added in pen later and initialed by the witnesses and the district attorney. T. 4243. The resulting documents in German were later translated into 71 pages of English, which were uniformly typed as amended, including the portions that had been added by later pen changes and omitting the deletions.

F. The Summaries Become Evidence.

When the jury was empaneled in the United States District Court in Cleveland, the government offered designated portions of these English translations as evidence. It relied on Rule 15(e), Fed. R. Crim. P., which provides that

> "a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable . . . ." A. 73a.

It invoked the "prior testimony" exception to the hearsay rule, Fed. R. Evid. 804(b)(1), which allows as evidence "a deposition taken in compliance with law" if the ad-

verse party "had an opportunity . . . to develop the testimony by direct, cross, or redirect examination." A. 75a. The government also invoked "the principles set forth in *United States* v. *Salim*, 855 F.2d 944 (2d Cir. 1988)," acknowledging that "[i]t may not have been called cross-examination in American terms," but arguing that "a defendant or any individual who elects to avail himself of the opportunity to operate in a foreign country, assumes the risk when he does that certain conduct of his will be reviewed utilizing a system other than one identical to our own." G.M. 10-23-89; T. 4250, 4254. When the defendants reminded the court that they had been told there would be a transcript, the government responded that:

> "That was never the situation as far as we were concerned. We pointed out to the Court that the Swiss authorities had advised the government that a verbatim transcript would not be allowed. My recollection is we advised your Honor of that . . . ." T. 4245.

The District Court over renewed objections granted the government's motion and admitted the summaries as evidence. The court's entire discussion of the objection to the District Attorney's conflict of interest and bias was:

> "As to the bias of the examining officer, I have looked at the transcript [*sic*]. I do not feel that defense has made a case of bias in this instance when I look at the questions that are propounded and the answers given . . . ." A. 55a.

Although it had earlier said that the defendants had a right "to cross examine—not to cross examine through some magistrate," T. 11-6-87 at 24, the court now concluded that

> "it appears to me that counsel for the defendants were entitled to submit questions to the magistrate for answers by the witnesses. So it appears to me that the procedure that was used, there was a right to confront witnesses that comports with due process and our constitutional guarantees." A. 53a-54a.

The absence of an oath or affirmation did not matter, the court said, because the witnesses had been warned.

At no point in its ruling did the District Court refer to the specific requirements of Rule 15. The court concluded that the summaries could be read to the jury as evidence because "it would appear to me that with foreign jurisdictions that have certain restrictions, what have you, you would never be able to have needed testimony in some cases if you took a position otherwise." A. 55a.

Designated portions of the English translations of the summaries then were read to the jury, in question-and-answer form. The jury was also handed exhibits that had been identified by the Swiss witnesses. Some of the portions read to the jury included entire sentences that had been later added in pen, in the original German version, and omitted lines that had been deleted in pen (including in some instances names of individuals). Some pen changes contradicted the original testimony. *Compare, e.g.*, T. 4437, 4442, 4443 (twice), 4471 *with* Court Ex. A.

Although the defendants requested the court to identify Herr Holdener accurately to the jury as "the district attorney in Zurich," the court instead described him as "an examining magistrate" and equivalent to a judge. The court told the jury:

> "Now, the Swiss do a little differently than we do, a lot differently in the way they do things in their judicial system. There is a person called a D.A. or an examining magistrate. In this case his name was Holdener. And he acted just like I would act . . . ." T. 4422-23.

When counsel objected that "You told the jury that Mr. Holdener acted as you would act," the District Court replied, "In hearing testimony, yes, he made rulings." T. 4425-26. It pointed out that it was "Mr. Holdener who was the person who had control over the conduct of this hearing." T. 4416.

G. The Court of Appeals' Decision.

The government argued in the Court of Appeals that

> "contrary to appellants' argument, Rule 15, Fed. R. Crim. P. does not require that a 'neutral and detached' judicial officer, as that term is interpreted under domestic law, preside over a foreign deposition." [7]

The Court of Appeals agreed. It held that Rule 15 together with Rule 28(b), Fed. R. Civ. P., "accept the necessity of foreign officials presiding over foreign depositions." A. 23a. It held that

> "If the law of Switzerland permits a person to serve as both magistrate and prosecuting attorney, then that practice must be permissible in obtaining depositions for United States litigation provided that the criteria of *Salim* are met." A. 23a.

The Court of Appeals adopted a dictum from the case on which the government had principally relied, *United States* v. *Salim*, 855 F.2d 944, 953 (2d Cir. 1988), that:

> "unless the manner of examination required by the law of the host nation is so incompatible with our fundamental principles of fairness or so prone to inaccuracy or bias as to render the testimony inherently unreliable . . . a deposition taken pursuant to letter rogatory in accordance with the law of the host nation is taken in compliance with law for the purposes of Rule 804(b)(1)." See A. 22a.

The Court of Appeals held that "the summary method of establishing the record was the most effective legal method," A. 22a, and that the constitutional right to cross-examine had been satisfied because the defendants had been allowed to submit questions and have the Swiss prosecutor question the witnesses for them. A. 22a-23a. The Court of Appeals noted that "[w]itnesses were given the opportunity to read the summaries and then sign

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[7] Brief for the United States, U.S.C.A., Sixth Circuit, at 94.

them," A. 21a; the court did not add that the witnesses had also been allowed to alter their answers. The Court of Appeals said that "the testimony complied with Rule 15(d) to the extent possible." A. 22a. It concluded, much as had the District Court, that

> "Depositions taken in foreign countries cannot at all times completely emulate the United States' method of obtaining testimony." A. 22a.[8]

REASONS FOR GRANTING THE WRIT

This case signals the end of any discernible limits on how the government can obtain testimony abroad for use as evidence in federal criminal trials.

For almost two centuries, the government was not allowed to take depositions for evidence in criminal cases at all. Now, less than twenty years after Rule 15 of the Federal Rules of Criminal Procedure was amended to let the government do so in "exceptional circumstances," the Sixth Circuit holds that the careful restrictions that were also made a part of Rule 15 may be ignored when they are inconvenient. It holds also that the only limit to evidence so obtained is whether it is "inherently unreliable" or violates "fundamental principles of fairness."

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[8] The Court of Appeals held that the warning of witnesses by the District Attorney satisfied the oath requirement A. 22a. It also stated, inaccurately, that "Swiss law forbids verbatim transcription," A. 22a, which was what the government had told the court in its brief. Brief for the United States, *supra*, at 91. In fact the Mutual Assistance Treaty, *supra*, provides in Article 12, § 6 that if a verbatim transcript is requested, "the executing authority shall make every effort to comply;" the Swiss, as previously noted, p. 8, *supra*, had advised the District Court that a verbatim transcript would be made if the U.S. Justice Department requested it; and the Swiss had in fact allowed a U.S. court reporter to make a verbatim transcript in *United States* v. *Casamento*, discussed *infra* pp. 23, 29.

Rule 15 was amended in 1975, in spite of widespread misgivings,[9] to allow for the first time government depositions to preserve testimony for use as evidence in criminal cases, as when a witness was in poor health or likely to leave the jurisdiction.[10] The amended Rule soon began to be invoked by the government to take depositions in foreign countries of witnesses who were "unavailable" because they refused to come to the United States.

For a while such testimony taken abroad conformed to the familiar format and procedure of U.S. domestic depositions, with a court stenographer making a verbatim transcript, witnesses under oath, and full examination and cross-examination, sometimes with a U.S. consular official in attendance to swear the witnesses and provide facilities. *E.g.*, *United States* v. *King*, 552 F.2d 833 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977). Recently, however, Rule 15 has begun to be used by the government not simply to follow ordinary federal criminal procedure outside the courtroom. Rather, it is becoming a license for the government to conduct evidence-taking for criminal trials in ways that are incompatible with U.S. constitutional and criminal procedure.

This case is the latest and the most extreme. Here the Court of Appeals does not even pretend that Rule 15 was complied with, and it simply brushes aside specific constitutional protections. Its holding seems to rest on some perceived need to follow whatever procedure is available, barring something wholly uncivilized, in order to obtain

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[9] Earlier versions of the amendment had been opposed by bar groups and rejected by the Committee on Rules of Practice and Procedure of the Judicial Conference and by this Court. See *United States* v. *Singleton*, 460 F.2d 1148, 1155-57 (2d Cir. 1972) (Oakes, J., dissenting), *cert. denied*, 410 U.S. 984 (1973); *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure*, 52 F.R.D. 409, 443-45 (1971). A similar provision, limited to organized crime, had been included as § 601(a) of the Organized Crime Control Act of 1970, 84 Stat. 922, 934, and is now 18 U.S.C. § 3503.

[10] Federal Rules of Criminal Procedure Amendments Act of 1975, § 3, 89 Stat. 370, 373-74.

testimony. It reflects the District Court's observation that otherwise "you would never be able to have needed testimony in some cases." A. 55a. But of course "[i]t is a truism that constitutional protections have costs." *Coy* v. *Iowa*, 487 U.S. 1012, 1020 (1988).

Moreover, the Sixth Circuit's assumption about necessity is unfounded. Federal prosecutors functioned for two centuries without being able to take any depositions for criminal evidence at all. They have managed since then to comply with Rule 15's requirements in countries as varying as Thailand, Japan, Belgium and, indeed, Switzerland.[11] But here the District Court did not order the government to press the Swiss to respect the needs of U.S. procedure, even after a Swiss police official himself made the suggestion, and even though this had successfully been done in other cases involving Switzerland.[12] The District Court did not even ascertain what exactly the procedure for taking the testimony would be. It simply advised the defendants to seek the best arrangement they could get from the Swiss "magistrate." P. 9, *supra*.

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[11] See *United States* v. *Sines*, 761 F.2d 1434 (9th Cir. 1985) (Thailand); *United States* v. *King*, 552 F.2d 833 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977) (Japan); *United States* v. *Gifford*, 892 F.2d 263 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 3243 (1990) (Belgium).

[12] See, *e.g.*, *United States* v. *Johnpoll*, 739 F.2d 702, 708 (2d Cir.), *cert. denied*, 469 U.S. 1075 (1984) (Swiss authorities "finally agreed to allow full cross-examination"); *United States* v. *Casamento*, 887 F.2d 1141 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990), discussed *infra* pp. 23, 29 (Swiss agreed to verbatim transcript, cross-examination by attorneys, undertakings by witnesses to testify truthfully). The Mutual Assistance Treaty with Switzerland provides that witnesses in Switzerland "shall" be sworn if requested by the U.S. government; that a U.S. official like a judge shall be allowed to be present; and that if the United States requests a verbatim transcript, Switzerland "shall make every effort to comply." Art. 12, §§ 1, 3, 6, pp. 79a-81a, *infra*.

At issue here is not prior testimony from some other proceeding. This was testimony ordered by the court and obtained, after indictment, for the sole purpose of being read to the jury as evidence in this very case. Here control of the examination of witnesses for a felony trial in a United States District Court was abandoned by the United States District Judge, and placed in the hands of a Swiss prosecutor—with the defendant's right to conduct cross-examination denied, with questions propounded by the Swiss District Attorney, with witnesses permitted to consult their attorneys before answering, with arguments between the District Attorney and the witnesses about their answers. The District Attorney, who had been assisting in this prosecution and had personally interrogated both a defendant and a witness, then submitted his own selective version of the proceeding—which, as later amended *ex parte* by the witnesses, then was given to the jury as substantive evidence to convict petitioner.

The decision of the Court of Appeals is irreconcilable with basic decisions of this Court and conflicts with the procedure approved for depositions under Rule 15 in at least three other Circuits. Petitioner has been denied the basic right of an individual charged with a felony to a trial controlled in every critical part by an unbiased judge appointed pursuant to Article III of the Constitution. He has also been denied the Fifth and Sixth Amendment rights, mandated also by statute and by Rule 15, to conduct cross-examination, not to be tried on *ex parte* statements of absent witnesses, and not to have someone's incomplete summary of what others said admitted as substantive evidence against him.

I. THIS COURT HAS RECOGNIZED AS A "SUBSTANTIAL QUESTION" WHETHER AN ARTICLE III JUDGE MUST PRESIDE AT ALL CRITICAL STAGES OF A FEDERAL FELONY PROSECUTION, AND HAS HELD THAT THE JUDGE MUST CONTROL THEM.

Last Term in *Peretz* v. *United States*, 111 S. Ct. 2661, 2665 (1991), this Court pointed out that a "substantial question" exists "whether a defendant has a constitutional right to demand that an Article III judge preside at every critical stage of a felony trial." (Footnote omitted.) This Court also referred to "our prior discussions of Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States." 111 S. Ct. at 2665 n.6. A felony defendant in a United States District Court has a "basic . . . right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside." *Gomez* v. *United States*, 490 U.S. 858, 876 (1989). The taking of testimony ordered for the purpose of trial evidence under Rule 15 is "a critical stage of the prosecution." *United States* v. *Gifford*, 892 F.2d 263, 265 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 3243 (1990).

United States magistrate judges have been allowed only narrowly circumscribed functions in felony cases, such as recommending disposition of motions or conducting suppression hearings, and then only when "the entire process takes place *under the district court's total control and jurisdiction*." *United States* v. *Raddatz*, 447 U.S. 667, 681 (1980) (emphasis supplied); see also *id.* at 685-86 (Blackmun, J., concurring). They may not preside without consent even at jury selection,[13] and no

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[13] *Gomez* v. *United States*, *supra* (construing 28 U.S.C. § 636). Some courts of appeals have concluded that the right to demand an Article III judge even at *voir dire* is constitutionally based. *United States* v. *France*, 886 F.2d 223, 226 (9th Cir. 1989), *aff'd by an equally divided Court*, 111 S. Ct. 805 (1991). This Court in *Peretz* v. *United States*, *supra*, left that undecided. 111 S. Ct. at 2669.

case has suggested that a U.S. magistrate could make unrecorded rulings in the taking of evidence for the jury.

By contrast, here the District Judge, as he himself acknowledged, had no control at all over the Swiss prosecutor. The government informed the court that "we will have to accept whatever they do." P. 4, *supra*. The District Court acceded. The District Court did not even know precisely what the Swiss "magistrate" intended. The District Court afterward acknowledged that "yes, he made rulings," and that it was "Mr. Holdener who was the person who had control over the conduct of this hearing." P. 13, *supra*. And unlike a proceeding before a U.S. magistrate, the absence of a verbatim transcript made meaningful review of what the Swiss prosecutor had done during four days of testimony impossible. See *Hardy* v. *United States*, 375 U.S. 277 (1964).

Article III responsibilities may not be delegated. *CFTC* v. *Schor*, 478 U.S. 833 (1986). Petitioner submits that if rulings are to be made that control the taking of evidence ordered for a federal felony trial, they must at the least be under the complete control of and subject to meaningful review by an Article III judge. There is nothing wrong in ordering an ordinary deposition, with lawyers and a court reporter, perhaps in the presence of a disinterested and non-participating official like a consul, to take place abroad, with a verbatim record to review and rulings reserved for the court. That is what Rule 15 was adopted to authorize, and that is the way it was executed until recently. Frequently a U.S. District Judge has attended.[14] But here a foreign prose-

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[14] *E.g.*, *United States* v. *Casamento*, *supra* n.12; *United States* v. *Kelly*, 892 F.2d 255, 262 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 3243 (1990); *United States* v. *Gifford*, 892 F.2d 263 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 3243 (1990). Sending a law clerk cannot cure an Article III problem. *Cf. Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1046 (7th Cir. 1984) (Posner, J., dissenting) ("A district judge cannot tell his law clerk, "You try this case—I am busy with other matters . . . .").

cutor replaced a United States District Judge. He did what no U.S. magistrate would be allowed to do. Rule 15 never contemplated such a thing, and the Due Process Clause and Article III do not allow it.

II. THE DECISION IGNORES THIS COURT'S HOLDINGS THAT DUE PROCESS REQUIRES A DISINTERESTED JUDGE.

Although the Court of Appeals referred to Herr Benedikt Holdener, who performed the taking of evidence, as "a Swiss magistrate" and "Magistrate Holdener," A. 21a, he was not, like a U.S. magistrate judge, a disinterested officer of the judicial system. Herr Holdener's office was "*Bezirksanwalt*," which unambiguously means "District Attorney." [15] Much like a district attorney in this country, his duty was to investigate and prosecute persons accused of crimes, with the added power to bring criminal charges against them. He also had the power to require testimony.

The government acknowledged to the Court of Appeals that "Benedikt Holdener . . . had investigative powers and had previously investigated Reuben Sturman concerning possible violations of Swiss law." [16] In fact, Herr Holdener had personally interrogated him. In addition, the Sixth Circuit recognized that "Magistrate Holdener had aided the United States in the investigation and prosecution of the defendants." A. 21a. And one of the witnesses at the proceeding in Zürich testified that Herr Holdener had previously interrogated him as part of the investigation of this case. T. 4467.

This Court for decades has held that due process of law prevents the same person from presiding at the trial

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[15] The court-appointed official translator, in all the official translations of the Swiss documents, translates his title *Bezirksanwalt* as "district attorney." See also 1 LANGENSCHEIDT'S ENCYCLOPAEDIC DICTIONARY OF THE ENGLISH AND GERMAN LANGUAGES, PART TWO 117, 281 (O. Springer ed. 1974).

[16] Brief for the United States, U.S. Ct. Apps., Sixth Circuit, at 94.

of a matter in which he has served as prosecutor. *In re Murchison*, 349 U.S. 133 (1955). Due process demands a judge who has neither official nor personal interest. *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Tumey* v. *Ohio*, 273 U.S. 510 (1927). Even a probable-cause determination at a preliminary hearing requires "the detached judgment of a neutral magistrate." *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975). This Court has also recognized that Article III enacts "the longstanding Anglo-American tradition of an independent judiciary" that is "free from control by the Executive." *United States* v. *Will*, 449 U.S. 200, 217-18 (1980). An official who has participated in the case as a prosecutor does not fit that constitutional description.[17]

Yet the Sixth Circuit now holds that when testimony is taken abroad, the constitutional requirement of a disinterested presiding official disappears. "If the law of Switzerland permits a person to serve as both magistrate and prosecuting attorney, then that practice must be permissible in obtaining depositions for United States litigation provided that the criteria of *Salim* are met." A. 23a.

III. THE CIRCUITS ARE IN CONFLICT IN APPLYING RULE 15.

Rule 15 should be construed to avoid constitutional defects, *cf. Gomez* v. *United States*, *supra*, 490 U.S. at 864, and that is how other Circuits have construed it. They have allowed foreign testimony only when there is a verbatim transcript to review and from which to read the jury; when the foreign witness is sworn, or at least first solemnly promises to tell the truth; when any foreign official present is a disinterested judicial officer; and, except for one case, when there is cross-examination directly by counsel, and often with a United States District Judge on

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[17] Further, Rule 15 authorizes only depositions that "shall be taken . . . in the manner provided in civil actions." Rule 28(c), Fed. R. Civ. P., provides that "No deposition shall be taken before a person who is . . . attorney or counsel of any of the parties."

the scene to assure compliance with the Constitution and laws of the United States.

—Thus the Ninth Circuit has allowed testimony taken abroad under Rule 15 when there was a United States consular official administering an oath, *United States* v. *King*, 552 F.2d 833 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977), and when not only a verbatim transcript but a complete videotape of the proceeding was made. *United States* v. *Sines*, 761 F.2d 1434, 1441 (9th Cir. 1985); *United States* v. *King*, *supra*.

—The Third Circuit, emphasizing that "depositions are not favored in criminal cases," *United States* v. *Wilson*, 601 F.2d 95, 97 (3d Cir. 1979), has approved testimony taken abroad when "[t]he entire proceeding was videotaped" and

> "The witnesses were under oath. . . . It was supervised by an American judge applying American evidentiary rules."

United States v. *Kelly*, 892 F.2d 255, 260, 262 (3d Cir. 1989) (footnote omitted), *cert. denied*, 493 U.S. 1081 (1990); see also *United States* v. *Gifford*, *supra*.

—The Second Circuit in *United States* v. *Casamento*, 887 F.2d 1141 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990)—involving, like the present case, testimony in Switzerland—followed a procedure utterly different from what the Sixth Circuit allowed here. A United States District Judge was present, commissioned as special master, and issued directions to counsel. Counsel questioned the witnesses directly, without the intervention of any Swiss official. "The proceedings were translated by an official Southern District interpreter, and a verbatim transcript was prepared by a certified Southern District court reporter." [18] Each witness began by undertaking to tell the truth. 887 F.2d at 1172, 1174.

An earlier Second Circuit decision, *United States* v. *Salim*, 855 F.2d 944 (2d Cir. 1988), unlike the procedure

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[18] Brief for the United States, *United States* v. *Badalamenti, Casamento, et al.*, No. 87-1294, U.S. Ct. Apps., 2d Cir., at 343.

later approved in *Casamento*, allowed testimony to be taken by a French judge outside the presence of the defendant—but, unlike here, with a complete translation and verbatim transcript for review, and a formal undertaking by the witness to testify truthfully. *Salim* launched the dictum—now widely cited by the government—that in Rule 15 depositions the only limits are inherent unreliability or "fundamental principles of fairness." 855 F.2d at 953. *Salim* has not been accepted by all the courts of appeals. The Third Circuit has emphasized that the procedures the Third Circuit approves "are in stark contrast to those approved in *United States* v. *Salim* . . . ." *United States* v. *Kelly*, *supra*, 892 F.2d at 262 n.6. But the Sixth Circuit here has gone in the opposite direction, and turned the *Salim* dictum into law.

IV. THE DECISION CONFLICTS WITH FIFTH AND SIXTH AMENDMENT DECISIONS OF THIS COURT.

A. The Fifth and Sixth Amendment Right To Conduct Cross-Examination.

A "major reason underlying" the Confrontation Clause of the Sixth Amendment is "to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." *Pointer* v. *Texas*, 380 U.S. 400, 406-07 (1965). Although the confrontation right is subject to certain hearsay exceptions and a few other narrow limitations, see *Maryland* v. *Craig*, 110 S. Ct. 3157 (1990), no case has questioned that if a witness is examined, the defendant under the Sixth Amendment has "the right to conduct cross-examination." *Coy* v. *Iowa*, 487 U.S. 1012, 1017 (1988), quoting *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 51 (1987) (plurality opinion); see also *Davis* v. *Alaska*, 415 U.S. 308, 315 (1974); *Douglas* v. *Alabama*, 380 U.S. 415, 418 (1965). Likewise, the Due Process Clause of the Fifth Amendment guarantees a defendant, "as a minimum, the right to examine the witnesses against him." *In re Oliver*, 333 U.S. 257, 273 (1948); *accord*, *Pointer* v. *Texas*, *supra*, 380 U.S. at 405.

That "right to conduct cross-examination," *Coy* v. *Iowa*, *supra*, which is also part of the right to effective assistance of counsel, is exactly what was denied to petitioner here. "Cross-examination often depends for its effectiveness of the ability of counsel to punch holes in a witness' testimony at just the right time, in just the right way," and "[t]his is true even if we assume no deceit on the part of the witness . . . ." *Perry* v. *Leeke*, 488 U.S. 272, 282 (1989). Yet petitioner's Swiss and American counsel were not allowed to test these government trial witnesses except by proposing questions to the Swiss district attorney, who if he approved would then phrase them as he thought proper, along with his own.[19]

Cross-examination also means having the witness answer without coaching. Yet here the witnesses, before they answered each question, could and often did consult their counsel, even though this was not disclosed in the district attorney's summaries. By contrast, this Court in *Perry* v. *Leeke*, *supra*, recognized a "rule . . . that applies to all witnesses" that "neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice." 488 U.S. at 281; *cf. also Idaho* v. *Wright*, 110 S. Ct. 3139, 3152 (1990) (unreliability increased by "the suggestive manner in which Dr. Jambura conducted the interview").

B. The Prohibition of Trial by Affidavit.

Herr Holdener's 78 pages of summaries were not a transcript of testimony. They were his incomplete version of what had been said.[20] Moreover, the witnesses

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[19] Petitioner objected repeatedly both in the United States and in Switzerland to having questions asked by the Swiss prosecutor rather than by counsel. How the Court of Appeals can "presume," A. 22a n.5, any waiver by petitioner of his right to conduct cross-examination is baffling. Having plainly objected, he did not waive by refusing to follow the Swiss prosecutor's procedure. See, *e.g.*, *Barber* v. *Page*, 390 U.S. 719 (1968); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

[20] At the normal rate of 40 pages per hour, four days of proceedings at five hours per day stenographically transcribed would fill 800 pages.

were allowed to make *ex parte* changes in the summaries later, adding entire sentences, sometimes contradicting prior statements, and deleting names that they had spoken. The changes were included in what was read to the jury. Together with the denial of true cross-examination, this use of summaries effectively subjected petitioner to trial by affidavit—"a particular abuse common in 16th and 17th century England" that the Sixth Amendment was designed to stop. *White* v. *Illinois*, 112 S. Ct. 736, 740 (1992). "[A]ffidavits, depositions, prior testimony" were a "discrete category of testimonial materials that was historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process." *Id.* at 747 (Thomas, J., concurring). See also *Maryland* v. *Craig*, *supra*, 110 S. Ct. at 3163; *California* v. *Green*, 399 U.S. 149, 156 (1970). And without a transcript, as this Court has held, it is impossible to determine exactly what occurred or for counsel to assist the defendant effectively. *Hardy* v. *United States*, 375 U.S. 277 (1964).

Rule 15(e) allows use as evidence at a criminal trial of "a deposition" that is "admissible under the rules of evidence." Rule 804(b)(1), Fed. R. Evid., authorizes as "former testimony" "a deposition" that is "taken in compliance with law," and with "opportunity [for] . . . cross . . . examination." But the translations of Herr Holdener's summaries were not "a deposition;" nor were they "taken in complaince with law;" nor was counsel allowed to conduct cross-examination.

Yet the Sixth Circuit now holds that the Swiss District Attorney's own selective and incomplete summaries were "prior testimony" under Rule 804(b)(1). But they fit within no "firmly rooted hearsay exception," nor can they even remotely satisfy the "particularized guarantees of trustworthiness" that this Court has held are the two circumstances in which under the Confrontation Clause hearsay may be used as substantive evidence. See *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980); see also *Idaho* v.

Wright, *supra*, 110 S. Ct. at 3147 ("residual" hearsay exception is not "firmly rooted");[21] *Coy* v. *Iowa*, *supra*, 487 U.S. at 1021 (1985 statute is not "firmly rooted"). The traditional "former testimony" exception to the hearsay rule contemplates "a transcribed copy of the reporter's stenographic notes." *Mattox* v. *United States*, 156 U.S. 237, 240, 244 (1895) ("many of the cases . . . hold that not the substance of his testimony only, but the very words of the witness, shall be proven"). *Cf. California* v. *Green*, *supra*, 399 U.S. at 165 ("the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings").

The Sixth Circuit cited Rule 28(b) of the Civil Rules, which allows depositions in civil litigation to be taken abroad pursuant to letters rogatory or before an individual commissioned by the court, and says that in such cases there need not be an oath or verbatim transcript. But that Rule, if it were applicable at all,[22] would apply only to section (d) of Rule 15, which deals with the *taking* of depositions. Their *admissibility* is governed by Rule 15(e), which specifies that they must be "otherwise admissible under the rules of evidence." In addition, the testimony was taken in plain violation of the Court Reporters Act, 28 U.S.C. § 753(b), which requires:

> "Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by

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[21] The government did not contend that the Swiss district attorney's summaries could satisfy the "residual" exception of Federal Rule of Evidence 804(b)(5), nor could they.

[22] Rule 15(d) directs that depositions "shall be taken and filed in the manner provided in civil actions," but then goes on to require that the "manner [of examination] . . . shall be such as would be allowed in the trial itself." No letters rogatory were issued here, and no commission to Herr Holdener was issued by the court. Rule 30(c), Fed. R. Civ. P. requires stenographic transcription unless another method is ordered under Rule 30(b)(4). Rule 30(b)(4), added in 1970, was designed simply to permit new, accurate transcription methods such as audiotaping or videotaping. See, *e.g.*, *Kallen* v. *Nexus Corp.*, 54 F.R.D. 610 (N.D. Ill. 1972).

> shorthand, mechanical means, electronic sound recording, or any other method . . . ."

It includes "such other proceedings as a judge of the court may direct or as may be required by rule . . . as may be requested by any party to the proceeding." [23]

C. The Prohibition of Unsworn Witnesses.

To allow conviction on testimony of unsworn witnesses "runs counter to the notions of fairness on which our legal system is founded." *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945) (footnote omitted). Thus Rule 603 of the Federal Rules of Evidence requires that

> "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with the duty to do so." [24]

For admissibility as testimony in a United States District Court, the witness must have solemnly undertaken to tell the truth. See, *e.g.*, *United States* v. *Morlang*, 531 F.2d 183, 190 (4th Cir. 1975); *United States* v. *Block*, 88 F.2d

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[23] It further provides that

> "No transcript of the proceedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record." 28 U.S.C. § 753(b).

The Act applies to every part of a criminal proceeding. *United States* v. *Selva*, 559 F.2d 1303 (5th Cir. 1977); *Edwards* v. *United States*, 374 F.2d 24, 26 n.2 (10th Cir. 1966), *cert. denied*, 389 U.S. 850 (1967). Some Circuits treat noncompliance with the Act, even in civil cases, as so serious that it may be challenged by mandamus. See *City of Pittsburgh* v. *Simmons*, 729 F.2d 953, 956 (3d Cir. 1984); *National Farmers' Organization, Inc.* v. *Oliver*, 530 F.2d 815 (8th Cir. 1976). Lack of a verbatim record also defeats the purpose of the requirement of Rule 15(f) that "Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition."

[24] See also Rule 30(f)(1), Fed. R. Civ. P., requiring "[t]he officer shall certify on the deposition that the witness was duly sworn . . . ."

618, 620 (2d Cir.), *cert. denied*, 301 U.S. 690 (1937).[25] And the Mutual Assistance Treaty with Switzerland specifically requires that if the United States requests, Switzerland "shall comply" and that "the time and form of the oath or affirmation shall be governed by" U.S. procedural requirements. *Id.*, Art. 12, § 1, pp. 79a-80a, *infra*.

In the other courts of appeals' decisions, the witnesses were sworn or promised to tell the truth.[26] The Sixth Circuit here holds that with a warning it makes no difference. A. 22a. It relies, ironically, on the *Casamento* case —in which the Second Circuit was at great pains to underscore the importance, in the absence of an oath, of an explicit undertaking by each Swiss witness to tell the truth. 887 F.2d at 1174-75. On that point as well as others, the present decision and *Casamento* are irreconcilable.

V. THE ISSUES ARE IMPORTANT.

The rights of federal criminal defendants when the government seeks foreign testimony now are quite different, depending on whether a federal indictment is returned in the Ninth, the Third, the Second or the Sixth Circuit—and, if the Court of Appeals here is correct, depending on which foreign country's system of justice

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[25] In 28 U.S.C. § 1746, which allows a declaration under penalty of perjury to substitute for an affidavit or simliar document, Congress specifically retained the oath requirement for depositions.

[26] *See United States* v. *Casamento*, *supra*, 887 F.2d at 1174-75 ("each [Swiss witness] stated at the beginning of his examination that he would tell the truth," United States District Judge Palmieri had each witness "solemnly affirm" truthfulness, and Judge Palmieri added a finding that "they were deeply impressed by the solemnity of the proceedings and the necessity to testify truthfully"). See also, *e.g.*, *United States* v. *King*, *supra*, 552 F.2d at 841 ("Both deponents were sworn in . . . ."); *United States* v. *Salim*, *supra*, 855 F.2d at 952 ("The French judge took pains to impress upon Rouhani the need to answer truthfully, and the witness promised that she would do so"); *United States* v. *Gifford*, 684 F. Supp. 125, 127 (E.D. Pa. 1988), *aff'd*, 892 F.2d 263 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 3243 (1990) ("[Judge] Palmieri administered to each witness the oath normally given in the federal courts").

the defendant is handed over to. This unresolved confusion grows more troublesome all the time, because invocation of Rule 15 by the government now is occurring more and more frequently as it is "increasingly necessary to conduct depositions in foreign countries." *United States* v. *Salim*, *supra*, 855 F.2d at 946.

The stark fact is that petitioner, although indicted by a U.S. federal grand jury, was then ordered to have trial evidence taken in a Swiss investigative proceeding, controlled by a Swiss prosecutor, without real cross-examination, without a transcript, with post-examination changes in testimony, and without meaningful review by an Article III judge. The Swiss may have a fine system for their own purposes. But petitioner was entitled to be tried by the Federal Rules and the Constitution of the United States.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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February 26, 1992

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APPENDICES

APPENDICES

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 24

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 90-3147/3148/3151/3750

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID A. STURMAN (90-3147); RALPH L. LEVINE 90-3148); REUBEN STURMAN (90-3151); and MELVIN KAMINSKY (90-3750),
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Ohio

Decided and Filed October 24, 1991

Before: KENNEDY and MILBURN, Circuit Judges; and WILHOIT, District Judge.*

KENNEDY, Circuit Judge.

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* The Honorable Henry R. Wilhoit, Jr., United States District Court for the Eastern District of Kentucky, sitting by designation.

I. STATEMENT OF FACTS

On June 25, 1987, the defendants were charged with one count of conspiring to defraud the United States by impeding governmental functions. Reuben Sturman was also indicted on counts of attempted tax evasion, filing false income tax returns, willfully failing to maintain records and file reports, and one count of endeavoring to obstruct justice. Following their conviction, Reuben Sturman was sentenced to 10 years imprisonment, fined approximately $2.5 million, and ordered to pay prosecution costs. The other defendants were sentenced to shorter terms and fined lesser amounts.

Reuben Sturman engaged in the production, sale, and distribution of sexually explicit books and tapes. Some of the individual businesses ran "peep booths" which played sexually explicit videos. David Sturman, Reuben Sturman's son, was responsible for his father's businesses in the San Francisco area. Ralph Levine ran the businesses in Nevada and Melvin Kaminsky managed Reuben Sturman's principal business, Sovereign News Company.

The defendants, led by Reuben Sturman, created 150 domestic corporations beginning in the 1960s. Reuben Sturman also formed five foreign corporations in countries following strict "corporate secrecy" policies. The testimony of numerous witnesses revealed that the named shareholders and nominees in these corporations were often fictitious. In other cases, real people were listed as shareholders, but their names and signatures had been used without their knowledge or permission. The prosecution proved that, in fact, Reuben Sturman was the beneficial owner of most of the corporations.

The defendants used the corporations to conceal income. They transferred money between corporations in ways that made tracing income and expenses difficult. The defendants also skimmed money from some of the adult entertainment businesses. This money was then

used to pay personal expenses or was transferred and deposited in Swiss bank accounts. These bank accounts were opened in 1974, as stated by Reuben Sturman, to "conceal his money" and "avoid taxes." (Testimony of Walter Butti, Alfred Graf and James Olsafsky.) The transfers to Switzerland were accomplished through a series of transactions involving both the foreign and domestic corporations.

Reuben Sturman took a variety of steps to conceal his activities from the authorities. A federal investigation in 1975 forced him to begin hiding documents. In 1979, following the issuance of subpoenas calling for various records, Reuben Sturman destroyed or hid many of the requested records. He took similar actions in response to a 1982 grand jury subpoena.

Tax records filed during the period of the conspiracy contained numerous false statements and inaccuracies. Reuben Sturman failed to report his ownership in the domestic and foreign corporations or his signature authority over foreign bank accounts. His tax returns for 1978-1982 underreported $2,735,713 in individual income. The other defendants also failed to report their signature authority in foreign accounts.

II. DENIAL OF DEFENDANTS' MOTIONS TO DISMISS COUNT I

All defendants filed motions to dismiss Count I which charged that the defendants,

> did unlawfully, knowingly and willfully conspire, combine, confederate and agree together and with each other to defraud the United States of America by hampering, hindering, impeding, impairing, obstructing and defeating the lawful Governmental functions of the Internal Revenue Service of the

> Treasury Department of the United States in the ascertainment, computation, assessment and collection of income taxes [in violation of 18 U.S.C. § 371.]

Defendants based their motions on this Court's decision in *United States v. Minarik*, 875 F.2d 1186 (6th Cir. 1989), which held that conspiracy to commit an offense and conspiracy to defraud, under 18 U.S.C. § 371, were two separate crimes. The District Court denied the defendants' motions holding that *Minarik* was inapplicable to the conspiracy charged in this case. We agree.

Count I of the indictment is based on 18 U.S.C. § 371 (1984) which states,

> [i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Count I charges the defendants under the defraud clause of the statute. This type of conspiracy is generally known as a "Klein" conspiracy. *See United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958). In *Klein*, several persons were charged with defrauding the United States by impeding and obstructing the lawful functions of the Treasury Department and concealing the nature of their business activities and source of income. As in this case, "the indictment [was] framed to make a general charge of impeding and obstrucing the Treasury Department . . . [with more specific allegations] as particular instances, rather than as substitute and complete allegations of the substantive crime itself." *Klein*, 247 F.2d at 916. The conspiracy in

Klein also involved a large number of domestic and foreign corporations, and multiple violations of the tax laws.

In *Minarik*, 875 F.2d at 1186, this Court addressed the two clauses of the conspiracy statute. One of the defendants in that case, Aline Campbell, had been issued three tax assessments for a total demand of $108,788.15. Campbell responded that she did not owe a tax. Shortly after the tax assessment, Campbell, together with her friend Robert Minarik, arranged for the sale of a house Campbell owned. The $47,500 payment was made in the form of seven checks for $4,900 and one check for $3,732.18. The buyer assumed a mortgage for the balance. When Campbell cashed two of the checks at the same bank, the IRS was contacted. The IRS agents obtained a warrant to search Campbell's car because she had attempted to avoid the Bank Secrecy Act which requires the filing of an IRS report for any transaction over $10,000. The defendants were charged with conspiring to defraud the government by concealing the nature of and income from Campbell's business affairs in violation of 18 U.S.C. § 371. The indictment did not make clear what function of the Treasury Department the defendants were impeding and the government changed its theory of the case throughout the indictment process and trial. The defendants could have been charged properly under section 7206(4) of the Internal Revenue Code which makes it a felony to conceal any goods or commodities on which a tax or levy has been imposed.

This Court held that defendants could not be charged under the defraud clause but convicted on evidence which suports the offense clause. In *Minarik*, the Court interpreted section 371 finding:

> the "offense" and "defraud" clauses as applied to the facts of this case are mutually exclusive, and the facts proved constitute only a conspiracy under

> the offense clause to violate 26 U.S.C. § 7206(4)
> . . . .

875 F.2d at 1187. The Court concluded that when Congress creates a specific offense out of conduct which was previously criminalized only if it took the shape of a conspiracy to defraud the United States, the court should require that a criminal conspiracy regarding that conduct be brought exclusively under the offense clause. *Id.* at 1194. Thus, if the offense clause covers an act or offense, a person cannot alternatively be convicted under the broad defraud clause. This rule comes into effect most often when a Congressional statute closely defines the duties a defendant is accused of violating. The Court reasoned that requiring an indictment to charge a defendant with conspiracy to commit a specific crime reduces the uncertainty in a case by defining up front the alleged crime.

Defendants here argue that the conduct alleged in Count I amounted to a violation of either 26 U.S.C. §§ 7206(1) or 7206(4) and that the conspiracy should have been charged under the offense clause of section 371. We disagree. The conspiracy alleged and proven here was broader than a violation of a specific statute.

This Court, in *Minarik*, noted that the holding in the case referred to the offense and defraud clauses "as applied to the facts in this case." 875 F.2d at 1187. The facts in *Minarik* and this case are distinguishable. Reuben Sturman set up a complex system of foreign and domestic organizations, transactions among the corporations, and foreign bank accounts to prevent the IRS from performing its auditing and assessment functions. Evidence shows that he committed a wide variety of income tax violations and engaged in numerous acts to conceal income. This large conspiracy involved many events which were intended to make the IRS impotent. No pro-

vision of the Tax Code covers the totality and scope of the conspiracy. This was not a conspiracy to violate specific provisions of the Tax Code but one to prevent the IRS from ever being able to enforce the Code against the defendants. Only the defraud clause can adequately cover all the nuances of a conspiracy of the magnitude this case addresses. As the Supreme Court had held with respect to specific violations within a conspiracy, "[t]he fact that the events include the filing of false statements does not, in and of itself, make the conspiracy-to-defraud clause of § 371 unavailable to the prosecution." *Dennis v. United States*, 384 U.S. 855, 863-64 (1966). In this case, the prosecution was entitled to indict the defendants under the defraud clause.[1] The broad nature of the conspiracy, and the associated violation of several statutes, distinguishes this case from *Minarik*. In this case, the alleged conduct violates several statutes. A "conspiracy to defraud" charge most clearly covers the conduct when viewed in its entirety.

The chief concern of this Court in *Minarik* was that the government, by constantly changing the prosecution theory, never adequately informed the defendant of the charges against him. In this case, no such changing theories have emerged. The prosecution has presented the case clearly and no confusion as to the charges is evident.

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[1] The government's brief cites four cases in which the Sixth Circuit has affirmed convictions based on the defraud clause. These defendants could also have been charged based on the offense clause. These decisions lend support to limiting *Minarik* to its facts. *See United States v. Jerkins*, 871 F.2d 598 (6th Cir. 1989); *United States v. Shermetaro*, 625 F.2d 104 (6th Cir. 1980); *United States v. Fruehauf Corp.*, 577 F.2d 1038 (6th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. Levinson*, 405 F.2d 971 (6th Cir. 1968), *cert. denied*, 395 U.S. 958 (1969).

III. INSUFFICIENT EVIDENCE CLAIMS OF DAVID STURMAN AND RALPH LEVINE

A. David A. Sturman

David Sturman asserts that the prosecution produced insufficient evidence to support his conviction. He specifically points to a lack of proof evidencing his participation in a conspiracy or of the formation of a willful conspiracy.

A conviction withstands a sufficiency of evidence challenge if

> after viewing the evidence in the light most favorable to the government and drawing all reasonable inferences in the government's favor, the evidence is sufficient to justify a reasonable juror's conclusion that each element of the offense has been established beyond a reasonable doubt . . . .

United States v. Poulos, 895 F.2d 1113, 1117 (6th Cir. 1990) (citations omitted). When attempting to prove an individual's participation in a conspiracy, the prosecution must first establish that a conspiracy existed. This Court stated the elements necessary for proof of conspiracy under 18 U.S.C. § 371 in *United States v. Meyers*, 646 F.2d 1142 (6th Cir. 1981):

> The essential elements of conspiracy are: (1) that the conspiracy described in the indictment was willfully formed, and was existing at or about the time alleged; (2) that the accused willfully became a member of the conspiracy; (3) that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged; and (4) that such overt act was knowingly done in furtherance of some object or purpose of the conspiracy as charged.

Id. at 1143-44. The existence of a conspiracy can be inferred from circumstantial evidence. *United States v.*

Levinson, 405 F.2d 971 (6th Cir. 1968), *cert. denied*, 395 U.S. 958 (1969). Once a conspiracy has been established, the prosecution need only produce slight evidence to implicate the defendant. *Poulos*, 895 F.2d at 1117.

Extensive evidence was submitted at trial to establish the existence of a conspiracy. Evidence against David Sturman included his admission that he had opened two Swiss bank accounts under assumed names, his signature authority over 20 additional accounts under the names of various fictitious persons, his directorship at one of the corporations used to channel money from other businesses, and his failure to report his signature authority over Swiss accounts as required by law. All of these activities were interrelated to his father's overall activities. His father's secretary and accountant were also active in the overall scheme. This evidence is adequate to prove the existence of a conspiracy. The testimony of various witnesses, the signature cards with David Sturman's name, and his own admissions implicate the defendant. The jury reasonably could have inferred from the evidence that David Sturman knew of the conspiracy, willfully became a member of the conspiracy, and participated in the concealment of assets from the IRS. This Court finds that a reasonable jury could find the evidence adequate to implicate the defendant and support his conviction and therefore affirms the District Court findings.

B. Ralph L. Levine

Levine argues there is insufficient evidence of any agreement on his part to become a member of the conspiracy, and that even if he did so agree, it was to a different conspiracy then [*sic*] the one alleged. For this Court to sustain a conviction of conspiracy,

> the defendant must know the purpose of the conspiracy, but not necesarily the full scope thereof,

> the detailed plans, operation, membership, or even the purpose of other members in the conspiracy.

United States v. Shermetaro, 625 F.2d 104, 108 (6th Cir. 1980). Further, the Court is bound by "all reasonable inferences and credibility choices in support of the jury's verdict." *United States v. Hughes*, 895 F.2d 1135, 1140 (6th Cir. 1990) (quoting *United States v. Stull*, 743 F.2d 439, 442 (6th Cir. 1984)).

As Levine concedes, Reuben Sturman conspired to defraud the government by creating numerous and complex means of concealing assets and income. Levine, who acted as a partner to Sturman, ran the Nevada businesses. An employee, Jack Marcum, testified that at least $70,000 in cash from the Nevada businesses went unrecorded every month. Levine failed to report the existence or use of this money and therefore furthered the purpose of the conspiracy. His signature authority and power of attorney on Swiss acounts, his failure to report such authority, and the signing of aliases on the signature cards provides further evidence from which the jury could imply willing membership. Levine argues that any findings that he participated in the conspiracy can only be based on inference piled on inference in violation of *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943). This Court finds the evidence presented adequate to find participation in a conspiracy even without multiplying inferences. A reasonable jury could find the evidence sufficient to convict the defendant.

IV. SINGLE VERSUS MULTIPLE CONSPIRACIES AND JOINDER OF CLAIMS

Levine and David Sturman both contend that the evidence establishes the existence of multiple conspiracies rather than only one large conspiracy. Levine also asserts that the District Court abused its discretion when it denied his motion for severance. The motion, based on Fed-

eral Rules of Criminal Procedure 14, claimed prejudice by the joinder of defendants at trial. Defendants have failed to preserve either of these issues.

At the end of trial, both Levine and David Sturman requested jury instructions on multiple conspiracies. The district judge declined to give the multiple conspiracy instruction and several other instructions requested by the defense. After the jury was instructed, Reuben Sturman's attorney, J. Michael Murray, raised a general objection "to the failure with respect to any of the jury instructions that have not been included." He then mentioned several specific instructions, by number, which he believed expressed a correct statement of law and were necessary to present a balanced statement of the case to the jury and potential defenses. Mr. Murray did not mention, even by number, the instruction addressing multiple conspiracies and gave no distinct reasons for objecting to the court's failure to include the multiple conspiracy instruction.

A general objection to district court jury instructions is insufficient to preserve a specific claim. Fed. R. Crim. P. 30 states:

> No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection.

This rule clearly indicates that a specific objection must be made with regard to charge requests. *See United States v. Friedman*, 854 F.2d 535, 555 (2d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989); *United States v. Martinez*, 776 F.2d 1481, 1484 (10th Cir. 1985) (holding that the objection "both instructions fit this case and should be given" is inadequate to preserve issue). The defendants in this case have failed to preserve the issue of multiple conspiracies for appeal.

Levine's contention that the District Court abused its discretion by denying his motion for severance is also without merit. Levine made several motions based on Rule 14 of the Federal Rules of Criminal Procedure. Rule 14 allows the trial court to grant a severance if it appears that a defendant is prejudiced by a joinder of offenses or defendants. Levine argued that the evidence against the co-defendants unfairly accrued to him and that no cautionary instruction could eradicate that accrual.

Levine has failed to preserve this claim for appeal. This Court has held that "a severance motion will be deemed waived if it is not renewed at the end of the evidence." *United States v. Swift*, 809 F.2d 320, 323 (6th Cir. 1987). Although Levine argued that he was entitled to a judgment of acquittal under Federal Rule of Criminal Procedure 29 because of the prosecution's failure to prove one conspiracy, he did not renew his motion for severance.

Even if Levine had preserved this claim, it is without merit. The Supreme Court articulated a test for denial of severance motions in *Kotteakos v. United States*, 328 U.S. 750 (1946). Succinctly, the test is whether the error had substantial influence on the judgment. *Id.* at 765. A denial of a severance motion is reversed only if there is abuse of discretion by the trial court. *United States v. Bibby*, 752 F.2d 1116 (6th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986). No abuse of discretion is apparent in this case. The District Court made repeated instructions to the jury to consider the evidence against each defendant separately. A jury is presumed capable of sorting and considering evidence separately. *Swift*, 809 F.2d at 323. In addition, much of the evidence in the trial would have been admissible if Levine had a separate trial. This Court finds no basis for reversing the District Court's denial of severance.

V. WILLFULNESS ELEMENT OF COUNTS XII-XV

Counts XII-XV charged Reuben Sturman with willfully failing to maintain records and file reports as required by 31 U.S.C. § 5314 (1982). The statute governs records and reports on foreign financial agency transactions. The government based these counts on Reuben Sturman's failure to file Form 90-22.1. This form must be filed by any person who has an interest in or signature over a foreign bank account with a balance in excess of a set dollar amount. Reuben Sturman objects to his conviction on these counts because he believes that the prosecution failed to show that he was aware of the Form 90-22.1 filing requirements.

In *Cheek v. United States*, 111 S. Ct. 604, 610 (1991), the Supreme Court established that the test for statutory willfulness is "voluntary, intentional violation of a known legal duty." Willfulness may be proven through inferences from conduct meant to conceal or mislead sources of income or other financial information. *Spies v. United States*, 317 U.S. 492, 499 (1943).[2] Other circuit courts have concluded that willfulness can be inferred from a conscious effort to avoid learning about reporting requirements. *United States v. Bank of New England, N.A.*, 821 F.2d 844, 855 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987).

The evidence in this case establishes that Reuben Sturman did take actions to conceal his assets from the federal government. He concealed his signature authority,

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[2] The defendant claims that *Spies* is irrelevant since it deals with specific charges of tax evasion rather than conspiracy to defraud the government. I would argue that the case is relevant. *Spies* did involve an indictment which contained a single felony charge of willfully attempting to defeat and evade a tax. However, willful failure to file a return and willful failure to pay taxes were cited as means to the end. 317 U.S. at 494.

his interests in various transactions, and his interest in corporations transferring cash to foreign banks. This conduct could be adequate for the jury to infer willfulness on the part of the defendant. In addition, the defendant did admit knowledge of and failure to answer a question concerning signature authority at foreign banks on Schedule B of his income tax return. This section of the return refers taxpayers to a booklet that further outlines their responsibilities for reporting foreign bank transactions. This booklet discusses the duty to file Form 90-22.1. These resources indicate that the defendant could have learned of the additional requirements quite easily. It is reasonable to assume that a person who has foreign bank accounts would read the information specified by the government in tax forms. Evidence of acts to conceal income and financial information, combined with the defendant's failure to pursue knowledge of further reporting requirements as suggested on Schedule B, provide a sufficient basis to establish willfulness on the part of the defendant.

VI. OBJECTIONS TO PROSECUTORIAL SUMMATION

Defendant Levine contends that statements by the prosecutor in his rebuttal argument deprived him of a fair trial and that the District Court abused its discretion when it denied his motion for mistrial based on the statements. Levine's attorney argued in summation that the prosecution had failed to produce any evidence which linked Levine to the purchase, sale, transfer of funds into or out of Swiss accounts. In response, the prosecution referred to cashiers checks from Nevada banks which had been deposited in Switzerland. The inference was that these checks established that money from sales in Nevada, where Levine managed Sturman's businesses, had been moved into foreign banks. Levine asserts that since no direct or concrete evidence was produced to link him with those foreign bank transactions, the prosecutor's remarks

were prejudicial and improperly suggested an unsupported inference.

Alleged prosecutorial prejudicial or biased remarks will warrant reversal only if the comments have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Moreno*, 899 F.2d 465, 468 (6th Cir. 1990) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). In this case, evidence did exist that suggested Levine had participated in the skimming and transfer of money from United States corporations to Swiss accounts. This evidence included Levine's signature on signature cards and the testimony of various witnesses. This evidence is adequate to support an inference by the jury that deposits to the Swiss accounts from Nevada reflects [*sic*] proceeds from the skimming of income in which Levine was involved. In addition, the jury was instructed that the arguments of the attorneys should be dismissed to the extent they were unsupported by the evidence. This Court finds Levine's guilt supported by the evidence and that the prosecution's summary argument did not "infect[] the trial with unfairness."

VII. ALLEGED BIAS OF A JUROR

Levine contends that he has been denied the right to a fair trial because the District Court failed to accord the defendant a hearing based on the defendant's claims of juror bias. This Court has held that,

> [s]ince the trial judge is in the best position to determine the nature and extent of alleged jury misconduct, his decision on the scope of proceedings necessary to discover misconduct is reviewed only for an abuse of discretion.

United States v. Shackleford, 777 F.2d 1141, 1145 (6th Cir. 1985), *cert. denied*, 476 U.S. 1119 (1986). The Supreme Court, in *Remmer v. United States*, 347 U.S.

227, 230 (1954), required a hearing in cases of jury bias to "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." [3]

During the course of this trial, Juror Olenik approached Judge White with concerns related to Levine's drawing pictures of the jurors during the trial. She advised the judge that some of the other jurors were also uncomfortable. When questioned, several of the jurors admitted being anxious over the drawings and their appropriateness. The judge assured the jurors that drawings by the defendants were permitted. He also told Juror Olenik that the drawings did not resemble any of the jurors. The judge asked each juror whether the incident would have any impact on their ability to remain fair and impartial. All the jurors responded negatively. Although the judge asked the jurors the questions originally requested by defense counsel, he denied defense requests for additional questioning. He did not allow the defense attorneys to ask any questions directly to the jury.

This Court has articulated four points to be considered when determining jury impartiality. *United States v. Zelinka*, 862 F.2d 92 (6th Cir. 1988). First, a hearing must be held. Second, the defendant bears the burden of proving bias. Third, no presumption of prejudice arises from the "contact." And finally, fourth, juror testimony at the hearing to determine juror bias is not inherently suspect. Although no case since *Remmer* has addressed the right of the defense to question jurors,

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[3] *Remmer* involved a case of jury tampering by outside influences. After the completion of the trial, it was revealed that a juror had been approached by someone who suggested it would be profitable to bring in a verdict favorable to the petitioner. The judge had ordered an investigation at the time the juror had reported the incident, decided the offer had been made in jest, and never notified the defense of the incident. The defense learned of the occurrence after the trial in the newspaper. 347 U.S. at 228.

such questioning would normally be important to the defense in its effort to prove bias. However, when the questioning of the jurors occurs during the trial it is preferable it be done by the judge. Jurors may resent being questioned directly by counsel.

Even if direct questioning of the jurors by the defense is required by *Remmer*, the absence of such questioning in this case is harmless error. Each juror was asked separately what had occurred and its impact on them. The juror who approached the court about the issue appeared mainly concerned with whether the defendant's drawings were permissible. The court adequately assured the jurors that Levine had done nothing improper. The judge was justified in taking at face value the jurors' assurances of impartiality. This Court finds that any deficiencies in the juror bias hearing were harmless error and the defendant was not entitled to a mistrial.

VIII. ADEQUACY OF 18 U.S.C. § 1503 ALLEGATION

Count XIV of the indictment charged Reuben Sturman with obstruction of justice in violation of 18 U.S.C. § 1503.[4] The court alleged that Reuben Sturman concealed or suppressed documents of various corporations which had been subpoenaed by the grand jury. Reuben Sturman argues that the charge did not provide sufficient information on the specific documents alleged destroyed or the particular corporations or subpoenas involved.

The Supreme Court has held that the fifth amendment indictment clause and the sixth amendment notice clause, as protected in Federal Rule of Criminal Procedure 7(c), require an inquiry to determine:

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[4] 18 U.S.C. § 1503 (1984) states, in relevant part, that whoever, corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

> first, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,' " and, secondly, " 'in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' "

Russell v. United States, 369 U.S. 749, 763-64 (1962) (citations omitted). Furnishing the defendant with a bill of particulars fails to save deficiencies in the indictment. *Id.* at 769-70. This Court, when reviewing the sufficiency of an indictment, must ask whether the omission complained of deprives the defendant of one of the protections which the guaranty of a grand jury indictment was meant to ensure. *Id.* at 763.

Count XVI of the indictment charges Reuben Sturman with endeavoring to obstruct justice in January 1982 in the United States District Court by destroying, concealing, and suppressing records of various corporations. The indictment clearly establishes the date and manner of the offense as well as the administrative body affected by the actions. This information sets forth all the elements necessary to establish and give a general description of the offense. Any technical deficiencies were harmless error since the indictment sufficiently apprised the defendant of the charges against him to enable him to prepare a response. *See United States v. Weiss*, 491 F.2d 460 (2d Cir.), *cert. denied*, 419 U.S. 833 (1974). The District Court correctly dismissed Reuben Sturman's motion to dismiss the charge.

IX. ADMISSION OF JAMES OLSAFSKY'S TESTIMONY

James Olsafsky was the government's key witness with respect to Count XVI of the indictment charging Reuben Sturman with destroying or concealing subpoenaed docu-

ments. Olsafsky handled the bookkeeping for fifteen to twenty of the stores owned by Reuben Sturman. Olsafsky testified that he was directed by Reuben Sturman to destroy numerous documents subject to a grand jury subpoena. The documents ordered destroyed included all records of corporations then in existence which contained the name of a living person. Records of defunct corporations were not destroyed. During examination of Osalfsky, the government requested that he flip through the file of a defunct corporation and identify what records he would have destroyed seven years previously if he had been asked by Reuben Sturman. The defense asserts that it is prejudicial error to allow a key witness to speculate on what documents he might have destroyed, and to bolster witness testimony with a demonstration of document destruction. They assert they are denied the right to cross-examine since the testimony was not based in fact.

District court decisions relating to the admission of testimony may not be reversed unless the defendant proves abuse of discretion and specific prejudice. Admissibility of evidence is measured by weighing the probative value of the evidence against its prejudicial value. *United States v. Zipkin*, 729 F.2d 384, 389-90 (6th Cir. 1984). The testimony to which Reuben Sturman objects merely serves to identify the types of documents Olsafsky was ordered to destroy. Since Olsafsky did in fact destroy documents, the use of a similar file to identify the type of destroyed documents is based on personal knowledge. The court was within its discretion in permitting the demonstration. Any prejudice would be outweighed by the probative value of Olsafsky's identification of the types of documents Reuben Sturman ordered destroyed.

X. ADMISSION OF EXPERT TESTIMONY

Reuben Sturman objects to the summary testimony of Internal Revenue Agent James Morrow who was involved in the investigation of this case. Reuben Sturman asserts

that Morrow's summary testimony was in fact a final argument to the jury, recounting unproven and contested facts. The defendant argues that permitting Morrow's testimony constitutes prejudicial error and requires a reversal of convictions.

Reuben Sturman relies on a Second Circuit case which held that witness credibility is for determination by the jury and that one witness cannot comment on the credibility of another witness. *United State v. Scop*, 846 F.2d 135, 142, *modified on reh'g*, 856 F.2d 5 (2d Cir. 1988). Agent Morrow, using charts, summarized the evidence and testified that the evidence showed a connection between the defendants, Swiss bank accounts, and a failure to report signature authority and income. Agent Morrow did not comment directly on any specific witness' credibility but rather gave his view of the events. The summary testimony was neither inflammatory nor prejudicial, the District Court properly instructed the jury on the elements of each count charged, and Agent Morrow's testimony and charts aided the jury in organizing the proof presented.

The admission of testimony summarizing evidence has been held to be admissible in income tax prosecutions. *United States v. Lattus*, 512 F.2d 352, 353 (6th Cir. 1975). This Court has allowed such testimony in criminal trials when the judge charges the jury as to all the elements necessary for conviction, where the summary is intended to aid the jury in organizing proof, and where the summary is not inflammatory or prejudicially worded. *United States v. Scales*, 594 F.2d 558, 562 (6th Cir.), *cert. denied*, 441 U.S. 946 (1979). We find that under this standard the District Court properly admitted the testimony.

XI. ADMISSION OF FOREIGN DEPOSITIONS

Reuben and David Sturman both contend that the depositions taken of four Swiss bank officials in Switzerland

did not comply with Federal Rule of Criminal Procedure 15. Rule 15(d) provides:

> Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that . . . the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself.

The defendants claim that the admission of the depositions at trial violated their rights to due process, confrontation and effective assistance of counsel.

Depositions of four Swiss bank officials were taken in Switzerland prior to trial. These depositions were presided over by a Swiss magistrate, Benedikt Holdener. Magistrate Holdener had aided the United States in the investigation and prosecution of the defendants. During the depositions, Holdener instructed the defendants to register any objections to the proceeding in writing. He disallowed verbatim transcription. Instead, Holdener dictated a summary of each question and response and noted objections either contemporaneously or required them to be submitted later in writing. Witnesses were given the opportunity to read the summaries and then sign them. During the trial in this case, the English translation of a portion of these depositions was read into the record.

A. Failure to Comply with Fed. R. Crim. P. 15

The District Court overruled the defendants' objections to the foreign depositions finding,

> that the defendants were entitled to be present there, they were entitled to have counsel there, counsel for the government was entitled to have questions read, and it appears to me that counsel for the defendants were entitled to submit questions to the magistrate for answers by the witnesses.

Under a test articulated by the Second Circuit, these procedural safeguards support allowance of the depositions despite variations from Untied States procedures. The Second Circuit held that a foreign deposition would be admissible,

> unless the manner of examination required by the law of the host nation is so incompatible with our fundamental principles of fairness or so prone to inaccuracy or bias as to render the testimony inherently unreliable . . . .

United States v. Salim, 855 F.2d 944, 953 (2d Cir. 1988). Swiss law forbids verbatim transcription so the summary method of establishing the record was the most effective legal method. All defense questions, with just one exception, were submitted to the witnesses so that objections and determinations on admissibility could be litigated later.[5] Although the witnesses were not given an oath, defense conceded that each witness was told the penalties for giving false testimony. The Second Circuit has recognized that an oath may not be given in some foreign countries and that the omission of such an oath does not automatically result in the suppression of the deposition. *See United States v. Casamento*, 887 F.2d 1141, 1172-75 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1138 (1990). Cross-examination, acceptance and consideration of objections, and the review of all written testimony by the witnesses ensured that the testimony complied with Rule 15(d) to the extent possible. Depositions taken in foreign countries cannot at all times completely emulate the United States' method of obtaining testimony. Here, all steps were taken to ensure the defendants' rights while respecting the legal rules established in a different country. The District Court achieved

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[5] It should be noted that only Reuben Sturman exercised his cross-examination rights. The other defendants are presumed to have waived their rights to cross-examination. The one question rejected by Holdener concerned the salary of one of the witnesses.

substantial compliance with Federal Rule of Criminal Procedure 15.

The same factors which demonstrate substantial compliance with Rule 15 rebut any claims based on due process violations or interference with effective assistance of counsel. The ability of the defendants to cross-examine, and the admission of all defense questions protected the defendants against the constitutional violations alleged. Defendants have failed to point to any way in which they were prejudiced by the procedures used.

B. Neutrality or Impartiality of the Magistrate

David and Reuben Sturman also object to Magistrate Holdener presiding over the depositions asserting that he was not neutral because of his role in the prosecutions. Holdener himself overruled the objection. Neither Rule 15 nor Federal Rule of Civil Procedure 28(b) address the issue of neutral or impartial magistrates. Instead, these rules accept the necessity of foreign officials presiding over foreign depositions. If the law of Switzerland permits a person to serve as both magistrate and prosecuting attorney, then that practice must be permissible in obtaining depositions for United States litigation provided that the criteria in *Salim* are met. The defendants have failed to establish evidence that Magistrate Holdener's handling of the deposition unfairly prejudiced the defendants or that the testimony could be considered unreliable. The defendants were provided sufficient opportunity to ask questions designed to refute the credibility of the witnesses. The admission into evidence of the depositions did not violate any constitutional rights of the defendants and did not constitute unfair prejudice.

C. Pierre Perrelet's Identification

The defense also objects to Pierre Perrelet's identification of defendant Reuben Sturman. Perrelet was asked to identify his former customer. He responded by stating, "[p]resumably the second gentlemen at the left side of the table in second place who is leaning on a briefcase

is a customer of SBC whom I looked after in the past." This description identified Reuben Sturman. Defense seeks a reversal of Reuben Sturman's convictions since this identification was based on a presumption. From the context in which the word "presumably" was used, it seems sufficiently clear that the witness was identifying the defendant and the "presumably" was merely a euphemism.

XII. DISQUALIFICATION OF DISTRICT JUDGE

Reuben Sturman argues that the district judge in this case was under a duty to *sua sponte* recuse himself because of his bias against the defendants. After pronouncing the sentence and judgment, the judge requested the defendants and their attorneys to approach the bench. He then stated that he had had to separate his feelings about the defendants' had[*] business from the defendants in imposing sentence. He concluded, however, by noting that he had tried his best to keep his feelings about the type of business in which the defendants were engaged out of the sentencing and believed he had succeeded.[6]

[* The word "had" was deleted from the opinion by order entered October 25, 1991.]

[6] The transcription of the judge's comments reads in part:

> I have gone out of my way, very frankly, as a judge to separate in my mind the business that the defendants are in from what they are charged with.
>
> . . .
>
> However, it is this Court's feeling that even thought [sic] the defendants are suffering and have gone through an ordeal, I can't help but think that having seen many movies that depicted certain scenes, that probably the gentleman involved in selling, first of all, it runs through my mind that somebody has to be paid to appear in those scenes.
>
> Quite frankly, I have to believe that some people who have acted in those scenes have gone through some tremendous pressures of their own.
>
> . . .
>
> I had to say that. I have tried my best to, and I think I have in keeping that from involving the sentence in this case. I have tried to limit it to the tax matters in this case and the

Reuben Sturman argues that the judge's comments indicate a bias which effected [*sic*] the entire four-month trial and previous years of motions and discretionary rulings. The defendant asserts that because the judge failed to recuse himself at the outset of the case, the convictions in the case must be reversed.

A federal judge is required to recuse himself "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). This Circuit has determined that whenever a judge's impartiality is questioned, it must be determined whether "a reasonable, objective person, knowing all the circumstances, would not have questioned [the judge's] impartiality." *Hughes v. United States*, 899 F.2d 1495, 1501 (6th Cir.), *cert. denied*, 111 S. Ct. 508 (1990); *see also* H.R. Rep. No. 1453, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6351, 6354.

Under the test established in *Hughes*, this Court must look at all the circumstances surrounding the case to determine whether a reasonable person would believe the judge was impartial. Several factors support a finding that Judge White acted impartially during the trial. First, the defendants can point to no decision on the part of the judge that clearly demonstrated bias. The contentions in the appeal that raise abuse of discretion issues have been found to be without merit. Second, the sentences given the defendants, rather than exhibiting bias against the defendants, are substantially below the level requested by the government and appear fair under the circumstances. Third, this Court may take at face value Judge White's assertion that he set his feelings about the defendants' business aside. Judges, whether they are hearing tax evasion cases or vicious murder

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conspiracy that was alleged and the other charges in this case which have nothing to do with—indirectly it may with the businesses—but should not involve my thinking in the sentences.

prosecutions, may have views about the nature and heinousness of the underlying crime. All judges, as part of their decisionmaking process, seek to set these feelings aside. Judge White merely articulated a tension all judges share. This Court holds that the defendants have failed to prove that Judge White's personal beliefs concerning pornography tainted the proceedings.[7]

XIII. VIOLATIONS OF THE MUTUAL ASSISTANCE TREATY

Reuben and David Sturman both raise objections to the use of records obtained from Switzerland under the Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 209, T.I.A.S. 8302. The Treaty ("Treaty") states that Switzerland agrees to provide information and access to bank records in Switzerland only for a specifically defined list of criminal offenses. Reuben Sturman asserts that the United States government submitted false information concerning the defendant's connection with organized crime in order to obtain his records under the Treaty. He claims that these submissions and the resultant release of records violated his fourth amendment privacy and fifth amendment due process rights. David Sturman objects to the use of the records obtained under the Treaty provisions in the case against him since the government did not provide evidence to Switzerland concerning David Sturman when they sought the records.

The United States requested assistance from the government in Switzerland in obtaining the bank records of Reuben Sturman. In acquiring these records, the United States government must submit evidence to Switzerland that shows the requested records relate to one of a select list of criminal offenses. The United States government

[7] No motion for recusal was filed with the District Court. Indeed, defense counsel complimented the district judge at this same sentencing hearing on his fairness in presiding over the case.

submitted evidence to Switzerland which indicated that Reuben Sturman had some relationship to organized crime. The evidence submitted to Switzerland was never disclosed to Reuben Sturman despite his discovery request. The District Court, after a [*sic*] *in camera* review of the evidence, ruled that the defendant had failed to show the government misrepresented the facts. Both David and Reuben Sturman assert that the records obtained as a result of the United States' action under the Treaty should not be admissible. They further argue that should this evidence be found inadmissible, the convictions based on the evidence should be reversed.

Article 37 of the Treaty provides that,

> [t]he existence of restrictions in this Treaty shall not give rise to a right on the part of any person to take any action in the United States to suppress or exclude any evidence or to obtain other judicial relief in connection with the requests under this Treaty . . . .

Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 209, T.I.A.S. 8302.[8] This language indicates that neither David nor Reuben Sturman have standing to raise a claim under the Treaty. Relying on the decision of the D.C. Circuit Court in *Cardenas v. Smith*, 733 F.2d 909, 917-19 (D.C. Cir. 1984), defendants claim that the Treaty cannot deprive them of constitutional rights. *Id.*

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[8] The Technical Analysis of Article 37 goes further adding,

> [e]nforcement of the provisions of the Treaty is a matter for the Contracting parties, and does not give rise to any right on the part of defendants . . . to obtain judicial relief . . . .

Technical Analysis of the Treaty Between the United States and Switzerland on Mutual Assistance in Criminal Matters, *reprinted in* Message from the President transmitting the Treaty with the Swiss Confederation on Mutual Assistance in Criminal Matters, 94th Cong., 2d Sess. 34 (1976).

at 919.[9] Because we find the defendants have not been deprived of their constitutional rights, we do not consider whether they have standing to raise such claims.

A. Fourth Amendment

Reuben Sturman maintains that, because of Switzerland's strict banking secrecy laws, he has a reasonable expectation of privacy protected by the fourth amendment. In support of his assertion of an expectation of privacy, he relies on the Swiss imprisonment or fine for revealing information and on the Treaty's goal of preserving the integrity of Swiss banking law. In essence, the defendant argues a constitutional right created by the statutory rights granted him by a foreign country to records in that country. No such right of privacy in banking records is recognized in the United States. *United States v. Miller*, 425 U.S. 435 (1976).

Any privacy right conferred on Reuben Sturman by Switzerland and any remedy given for a violation of that right is limited by the terms of the Treaty. The Treaty clearly indicates that the Swiss government has agreed that an American citizen's right to privacy can be curtailed under certain circumstances. The Treaty also evidences a decision by the Swiss government to limit the remedy available once bank records are released. The

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[9] The *Cardenas* case involved an appeal by a nonresident alien seeking redress in United Sttaes Courts for the seizure of Swiss accounts in which plaintiff had an interest. The United States government had encouraged the Swiss government to seize the accounts. The plaintiff claimed that the seizure violated her rights under the fourth and fifth amendments as well as various statutory and Treaty related obligations. The D.C. Circuit recognized that Article 37 precluded any claims arising under the Treaty. The court found, however, that there was no evidence that the Treaty intended to preclude judicial review of the statutory and constitutional claims. The court reversed the lower court's decision to dismiss the complaint so that the statutory and constitutional claims could be heard. 733 F.2d at 911-19.

Swiss government has limited the right to privacy given by its laws and denied to depositors any expectancy that, if records were disclosed in the United States, they could be suppressed or excluded from evidence. This intent is plainly stated in the language of Article 37 which is part of the law of Switzerland as well as the United States.

Even if Article 37 does not foreclose a fourth amendment claim for suppression of evidence, Reuben Sturman had no reasonable expectation of privacy in the documents for fourth amendment purposes. The Treaty makes any expectation of privacy limited through its terms. If no such expectation exists, then his ability to raise a fourth amendment claim is limited by the holdings of the United States Supreme Court. The Supreme Court has held that there is no privacy interest in the records and documents of third parties. *Rakas v. Illinois*, 439 U.S. 128 (1978); *Miller*, 425 U.S. at 435. Further, the fourth amendment does not justify exclusion of evidence when the defendant is not the victim of the challenged practices. The supervisory power of the federal courts does not allow it to suppress evidence that has been seized unlawfully from a person not before the court. *United States v. Payner*, 447 U.S. 727 (1980). Thus, since an individual has no privacy interest in his bank records, he cannot make a motion for exclusion once they are obtained. Only the holder of the records, for example the bank, can raise an objection.

B. Due Process Claims

Reuben Sturman asserts that the submission of false statements linking him to organized crime in order to obtain information from a foreign country is the type of governmental misconduct which violates substantive due process. He also claims that he was denied any reasonable opportunity to respond to the charges in the documents submitted to the Swiss government and has thus been denied his procedural due process rights. These claims are without merit.

A review of the submissions to the Swiss government reveals that the documents contain no serious misrepresentations concerning the defendant. The District Court's review of the documents generated the same opinion. Even if misrepresentations were found, a reversal of conviction is not automatic. A federal court's supervisory power allows the court to remedy cases of serious governmental misconduct. *Payner*, 447 U.S. at 727; *United States v. Gjieli*, 717 F.2d 968 (6th Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984). Reversals of convictions using this power should not be granted readily. *Id.* at 978. This Court has held that the reversal of a conviction should be granted only when the following prerequisites are met:

> (1) there must be a constitutional injury which is personal to the complaining defendant, (2) the injury must "harm" the defendant in a legally significant way, (3) there must be an injury to the judicial system, (4) the "remedy" selected by the Court to preserve judicial integrity and deter future misconduct may not exceed established limitations on the court's power, and (5) the remedy selected must be narrowly tailored.

Id. at 978-79.

In *Gjieli*, the government improperly released defendant, Zeff Lulgjuraj, from prison. His release signalled his codefendants that a Bureau of Alcohol, Tobacco and Firearms agent was ready to deliver Lulgjuraj to them. The government officials submitted a false writ to a district judge in order to obtain the prisoner's release. One agent posed as a United States Marshal in order to secure custody of the prisoner. Applying the test above, this Court held that the government's misconduct did not entitle the defendants to reversal of their convictions. *Id.* at 979.

In this case, Reuben Sturman has suffered no identifiable constitutional injury. The defendant has no consti-

tutional right to review submissions to the Swiss government made in the course of an investigation. Even if such right existed, the defendant received adequate protection through the *in camera* review of the documents by the District Court and this Court. As discussed above, no right arises from any expectation of privacy asserted by the defendant. Reuben Sturman also urges that this Court find a deprivation of a liberty interest due to the stigmatization of his name. The documents submitted to the Swiss government have never been released or made public. This Court has held that "in order to establish a protectable liberty interest, the plaintiff must demonstrate . . . that the defendants publicly and voluntarily disclosed stigmatizing charges or information . . . ." *Yashon v. Gregory*, 737 F.2d 547, 556 (6th Cir. 1984).

Misconduct, if any, committed by the government in this case is not as serious as that committed in *Gjieli* where a reversal of conviction was denied. We find that the defendant has failed to satisfy the test articulated in *Gjieli*.

C. David Sturman

David Sturman obtained a decision from the Swiss Federal Supreme Court which held that no Swiss evidence could be used against him in a case for tax evasion. Notice of Ruling by the Swiss Supreme Court That No Evidence Obtained from Switzerland May be Used Against David Sturman, October 13, 1989. Using this decision, David Sturman objected to the use of the evidence in the District Court. The District Court overruled his objection. We agree. The Swiss Central Authority advised the United States government that the Swiss documents could only be used against the codefendants if they were participants in Reuben Sturman's criminal activities. Article 5 para. 2(b) of the Treaty provides that evidence obtained under the Treaty can be used against persons accused of participating in the criminal

activity and accessories. Evidence produced during this trial shows David Sturman's participation in Reuben Sturman's criminal activity. The admission of the Swiss evidence was thus permissible under the Treaty.

XIV. DENIAL OF REUBEN STURMAN'S DISCOVERY REQUEST

A Special Agent of the IRS, Richard N. Rosfelder, who was in charge of the investigation against the defendants, testified at trial about the investigation. Following his testimony, Reuben Sturman requested that the government produce several documents related to the testimony. Specifically, the defendant requested Rosfelder's Special Agent's Report outlining the investigation and suggesting indictment, the submission to the Swiss government sent with the request for information under the Mutual Assistance Treaty, and the agent's grand jury testimony. The defendant claims that the government failed to produce 99% of the Special Agent's Report, the Swiss submissions, and 100 pages of grand jury testimony. The District Court held that the missing documents did not need to be produced and refused a request to conduct further voir dire of Special Agent Rosfelder to determine the contents of the documents.

A trial court's rulings on matters relating to the production of documents is reviewed under a clearly erroneous standard. *United States v. Nathan*, 816 F.2d 230 (6th Cir. 1987). The defendant raises two arguments in support of his contention that the denial of his discovery motion was reversible error.

First, the defendant claims that the denial of the discovery motion violates the provisions of the Jencks Act. 18 U.S.C. § 3500 (1985). The Jencks Act addresses demands for the production of statements and reports of witnesses. Particularly, the statute provides:

> After a witness called by the United States has testified on direct examination, the court shall, on

> motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness testified.[10]

It is clear that the submissions to the Swiss government do not fall under the protections of the Act since they were prepared and signed by government attorneys, were not a verbatim transcript of any statements made by the agent, and were not reviewed for accuracy by the agent. The Special Agent's Report was reviewed by the District Court and certain sections which appeared to be statements of the witness were ordered released to the defendant. The remainder of the document is an internal prosecution report, prepared prior to the events discussed under direct examination, and thus exempt from discovery under the Jencks Act. *United States v. O'Keefe*, 825 F.2d 314, 319 (11th Cir. 1987). The defendant also protests the denial of discovery with respect to the redacted portions of the grand jury testimony. The government claims that these portions did not need to be given to the defendant since they did not relate to the direct testimony of the witness and merely summarized documentary evidence and discussed subjects of investigation other than Reuben Sturman. A review of the redacted portions of the testimony reveals that this assessment is accurate.

Second, the defendant raises a protest to the nondisclosure of these documents based on *Brady v. Maryland*,

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[10] The statute defines the term statement as

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e).

373 U.S. 83 (1963). The Supreme Court held in *Brady* that the suppression by the prosecution of evidence which is material to either guilt or punishment violates due process. This Court has held that,

> if the government does fail to disclose *Brady* material, the defendant has a constitutional remedy for the nondisclosure *only* if the defendant can show that there is a reasonable probability that "the omission deprived the defendant of a fair trial."

United States v. Presser, 844 F.2d 1275, 1282 (6th Cir. 1988) (citation omitted) (emphasis in original). The defendant has failed to show a reasonable probability that he was denied a fair trial. The evidence supporting the defendant's conviction was substantial. No arguments were made which suggest the information withheld contains facts which go directly to the guilt or innocence of the defendants. Both this Court and the District Court, in their *in camera* review, found that they do not. The District Court did not err in denying Reuben Sturman's discovery motion.

XV. THE BANK SECRECY ACT AND SELF-INCRIMINATION

Reuben Sturman was under investigation for tax-related violations from 1976 and was under grand jury investigation from 1978. These investigations included the examination of the defendant's foreign bank accounts. Reuben Sturman's indictment listed several counts, associated with The Bank Secrecy Act, which alleged that the defendant had failed to file information related to the foreign accounts during the years he was being investigated. The defendant claims that the Bank Secrecy Act, which requires a person to file certain information if they have over a minimum amount of money in foreign accounts, is directed at persons suspect of criminal activities and promotes self-incrimination. The defendant asserts that the Act is therefore unconstitutional and that

the trial court erred in denying his motion to dismiss and motion for judgment of acquittal on the counts related to the Act.

The Supreme Court has held that taxpayers cannot assert a violation of their rights against compulsory self-incrimination when they refuse to answer questions on a tax return for fear authorities will discover illegal activity. *United States v. Sullivan*, 274 U.S. 259, 260 (1927). *Sullivan* implies that any objections to specific questions will be considered only if the individual files a completed return and raises the objections in the return. A defendant's fear of self-incrimination cannot serve as a defense to a failure to complete the information called for on his tax return unless he raised an objection when he filed.

Even if *Sullivan* were not applicable to this situation, the defendant's claim is still without merit. The defendant bases his claim on a line of cases which have found various reporting requirements in violation of the privilege against compulsory self-incrimination when specific conditions are met. *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968).[11] The Supreme Court held in these cases that statutes violate the right against compulsory self-incrimination when (1) they are directed against a "selective group inherently suspect of criminal activity"; (2) requirements are imposed in an "area permeated with criminal statutes"; and (3) reporting requirements would have placed the subject in real danger of self-incrimination. *See Mar-*

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[11] These cases dealt with an occupational tax related to wagers. Under the statute, persons registering as wagers [*sic*] had to keep on their persons stamps showing the payment of tax, maintain daily wagering records, and keep their books open for inspection. These persons were also liable for an occupational tax. The petitioners in these cases argued that the registration and tax requirements violated their rights against self-incrimination. Based on the criteria discussed above, the court found for the petitioners.

chetti, 390 U.S. at 47; *Grosso*, 390 U.S. at 64. The Bank Secrecy Act applies to all persons making foreign deposits, most of whom do so with legally obtained funds. The requirement is imposed in the banking regulatory field which is not infused with criminal statutes. In addition, the disclosures do not subject the defendant to a real danger of self-incrimination since the source of the funds is not disclosed. It is not evident from the information provided whether the money in the account came from a legitimate adult entertainment business or from a scheme to skim money from a business. Thus, the defendant has failed to show that the Bank Secrecy Act violated any individual right *Marchetti* and *Grosso* seek to protect.

XVI. DOUBLE JEOPARDY

Reuben Sturman received consecutive fines for Counts VII-XI, charging him with making and subscribing a false tax return in violation of 26 U.S.C. § 7206(1), and Counts II-VI, charging him with attempting to evade income taxes in violation of 26 U.S.C. § 7201. Relying on several cases from other circuit courts,[12] the defendant argues that filing a false tax return under section 7206(1) is a lesser included offense under attempted income tax evasion in violation of section 7201. In cases of lesser included offenses, consecutive sentences are double jeopardy since the offender cannot be tried and convicted under both statutes. At least one court, however, has recognized that the cases cited by the defendant address only cases where the proof of tax evasion necessarily proves the preparation and filing of a fraudulent return. *United States v. Franks*, 723 F.2d 1482, 1487 (10th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984). The Tenth

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[12] *United States v. Citron*, 783 F.2d 307, 312 (2d Cir. 1986), *following remand*, 853 F.2d 1055 (2d Cir. 1988); *United States v. Pulawa*, 532 F.2d 1301, 1302 (9th Cir. 1976); *United States v. Slutsky*, 487 F.2d 832, 845 (2d Cir.), *cert. denied*, 416 U.S. 937 (1974).

Circuit found that a misrepresentation of foreign bank account information is distinct from understating income on a tax return. Proving that a taxpayer violated section 7602(1) by misrepresenting her interest in or signature authority on a foreign account does not necessarily prove tax evasion. When the proofs on the charges are separate, the sentencing may be consecutive. *Id.* at 1487. We adopt the reasoning of the Tenth Circuit and allow the sentence to stand.

XVII. REFUSAL TO GIVE JURY INSTRUCTIONS

Reuben Sturman objects to the trial court's rejection of nine jury instructions requested by the defendant. Defendant seeks a reversal of his convictions due to the jury instruction errors. The defendant's objections are without merit.

The first requested jury instruction whose denial the defendant protests would have informed the jury that the activities of the defendants were not illegal unless the activities furthered a conspiracy to impede the IRS. A jury instruction read by the court instructed the jury that a conviction of the defendants on Count I was only possible if the government showed that the "means or methods described in the indictment were agreed upon to be used in an effort to . . . accomplish . . . the conspiracy." This instruction adequately covers the same ground as the requested instruction.

Defendant's requested jury instructions numbered 9, 10, 13, 14, and 15 set forth the defendant's argument that if the government had proved evasion of corporate, as opposed to individual income, then he was entitled to acquittal. The defendant asserts that the failure to present the requested instructions resulted in the jury only being presented with the prosecution's theory of the case. These instructions were addressed at Counts II-VI and and Counts VII-XI. The defendant has waived his right

to object to the court's refusal to give instructions 14 and 15 by failing to present distinct and clear objections with regard to those instructions.

The defendant's theory of the case as presented in requested instructions 9, 10, and 13 makes an incorrect statement of law. The requested instructions call on the jury to distinguish between income of the defendant and income accruing to the corporations. In this case, all the Swiss accounts were set up in the name of individuals. This Court, in *Davis v. United States*, 226 F.2d 331 (6th Cir. 1955), *cert. denied*, 350 U.S. 965 (1956), held that the unexplained transfer of funds to an individual's account constituted income to the individual. The government was not required to prove what use was made of the funds. The defense failed to prove that any of the funds were used to the benefit of any corporation.

The defendant next objects to the District Court's rejection of his suggested instructions 7 and 8 which addressed his reading of *Minarik*, 875 F.2d at 1186. This Court has found that the District Court properly allowed Count I and that *Minarik* did not apply in this case. Thus, no error resulted from the District Court's failure to give instructions 7 and 8.

The final objection raised in connection with jury instructions concerns defendant's requested instruction 17. This instruction, which sought to define when a false statement is knowingly made, was requested in relation to Counts VII-XI which charged the defendant with willfully filing fraudulent tax returns. The instruction stated that in order to establish a knowingly made false statement the defendant must knowingly make a statement and know that the statement is false. The instruction was designed to present defense's assertion that failure to answer a question did not constitute a knowingly made false statement. It is a crime for any person to willfully make "any return, statement . . . which he does not believe to be true and correct as to every mate-

rial matter." 26 U.S.C. § 7206(1). The District Court properly instructed the jury that the government had to prove that the defendant willfully made a false statement "as to a material matter alleged in the indictment." This instruction covered the issue presented by requested instruction 17. This Court finds no error on the part of the District Court with regard to jury instructions.

XVIII. ADMISSION INTO EVIDENCE OF FOREIGN BANK RECORDS

Volumes of business records from seven foreign banks were presented at trial. These records were "certified" by twelve affidavits or certificates of authenticity. This practice, adopted by Congress in 18 U.S.C. § 3505, dispenses with the necessity of calling a live witness to establish authenticity.

Section 3505 allows the admission of foreign records, and prevents their exclusion as hearsay, provided that a foreign certification attests to certain facts.[13] A foreign certification serves to authenticate the records. Reuben

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[13] 18 U.S.C. § 3505 reads in relevant part:

(a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that—

(A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(B) such record was kept in the course of regularly conducted business activity;

(C) the business activity made such a record as a regular practice; and

(D) if such record is not the original, such record is a duplicate of the original;

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

. . . .

Sturman asserts that there was error in the admission and maintenance of records the prosecution received from Switzerland. He also objects to the admission of the foreign bank records urging that section 3505 is unconstitutional because it deprives him of his right to confrontation.

The certificates at issue indicated that the person signing the certificates was acting in the capacity of custodian of the records, that the records were made or received in the regular course of business, and that the records were part of a regular business practice that made or received the documents at the time, or within a reasonable time thereafter, of the recorded event. These attestations satisfy most of the provisions of section 3505. The certificate fails to state that the "record was made . . . by (or from information transmitted by) a person with knowledge of those matters." 18 U.S.C. § 3505(a)(1)(A). Reuben Sturman contends that this foundational element must be established. This Court, when interpreting similar language in Federal Rules of Evidence 803(6),[14] has held that a witness need only have knowledge of the recordkeeping procedures. *United States v. Hathaway*, 798 F.2d 902 (6th Cir. 1986). In this case, a bank official, who would necessarily have some knowledge of the bank's recordkeeping procedures, provided the certification.

The defendant also protests that the certificates were not physically attached to the records being authenticated and that the certifications did not identify the specific records they authenticate. Neither of these assertions is valid. Section 3505 contains no requirement that the certificate be attached to the authenticated record. Each

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[14] Fed. R. Evid. 803(6) list [*sic*] evidence which may not be excluded by the hearsay rule. Section 6 addresses records of regularly conducted activity. Such records must be "made at or near the time by, or from information transmitted by, a person with knowledge . . . ."

certificate was associated with a transmittal record that listed the account and record of accounts being produced. The certifications incorporated these transmittal letters.

The defendant also raises the following arguments: (1) that the "legal advisor" who signed the certification was not a "custodian" under the requirement of section 3505; (2) that section 3505 does not refer to records "received" which the certification includes in its description of the records; and (3) that the certification states that it was the regular course of business to make "documents of this kind" rather than the specific record being authenticated. After a careful consideration of these issues, this Court find the claims to be without merit.

Reuben Sturman also alleges that section 3505 deprives him of his sixth amendment right of confrontation. We disagree. The confrontation clause does not establish an absolute exclusion of all hearsay. Testimony of an unavailable witness is permissible provided it contains an "indicia of reliability." *United States v. Miller*, 830 F.2d 1073 (9th Cir. 1987), *cert. denied*, 485 U.S. 1033 (1988) (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)). The Supreme Court in *Bourjaily v. United States*, 483 U.S. 171, 182-83 (1987), has held that "[b]ecause 'hearsay rules and the Confrontation Clause are generally designed to protect similar values,' . . . no independent inquiry into reliability is required when the evidence 'falls within a firmly rooted hearsay exception.'" (quoting *Roberts*, 448 U.S. at 66) (citations omitted). Section 3505 establishes an exception to the hearsay rule for foreign business documents. This exception ensures that the requirements of the Confrontation Clause are automatically satisfied.

Finally, the defendant claims that the prosecution failed to satisfy the foundational requirements of Federal Rules of Evidence 602 and 901. Rule 602 requires the introduction of evidence which supports a finding that a witness has personal knowledge of the matter on which

they are to testify. Rule 901 requires authentication and identification prior to the admissibility of any evidence. The admissibility of foreign records is a question that may be determined by the court before trial. Fed. R. Evid. 104(a); Fed. R. Evid. [*sic*] 3505(b); *United States v. Tedder*, 801 F.2d 1437, 1448 (4th Cir. 1986), *cert. denied*, 480 U.S. 938 (1987). The District Court held a pretrial hearing on November 6 and 16, 1987 to determine the admissibility of the challenged records. There was no necessity of repeating this hearing before the jury. In addition, the prosecution did have Special Agent Rosfelder testify regarding the receipt, custody, and certification of the records. The defense was given an opportunity at that time to cross-examine the witness.

Special Agent Rosfelder admitted during his testimony that he did not have custody of the records at all times and therefore lacked personal knowledge regarding some of the details of the receipt and maintenance of the records. Even if the court did commit error by allowing Rosfelder to testify on an issue of which he did not have personal knowledge, the error is harmless. Special Agent Rosfelder's testimony was sought as the result of challenges to the certification of the records. Since we find the certificates to be adequate, the testimony was unnecessary.

CONCLUSION

Accordingly, the decision of the District Court is AFFIRMED as to all defendants.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR 85-133
JUDGE GEORGE W. WHITE

UNITED STATES OF AMERICA,
Plaintiff,

v.

REUBEN STURMAN, *et al.*,
Defendants.

[Filed Aug. 12, 1985]

MOTION FOR PRE-TRIAL DEPOSITIONS
OF WITNESSES LOCATED IN SWITZERLAND

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* * * *

Motion granted.

It is so ordered.

/s/ G. White
8-25-88

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR 85-133
HON. GEORGE W. WHITE

UNITED STATES OF AMERICA
Plaintiff

vs.

REUBEN STURMAN, *et al.*
Defendants

[Filed Feb. 9, 1989]

ORDER

On December 19, 1988 defendant Reuben Sturman filed an Administrative Court complaint with the Swiss Federal Tribunal, wherein he appealed the November 19, 1989 decision of the Swiss Federal Office for Police Matters dismissing Reuben Sturman's objections to the taking of depositions in Zurich, Switzerland. Because of this appeal and the need for these depositions the trial scheduled for February 21, 1989 is continued to on or about June 5, 1989. The depositions that are to be taken in Switzerland will be rescheduled to on or about April 24, 1989 or as soon thereafter as can be arranged with the Swiss Magistrate. A status hearing is scheduled for March 20, 1989 at 1:30 P.M.

IT IS SO ORDERED.

/s/ George W. White
GEORGE W. WHITE
U.S. DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR 85-133
JUDGE GEORGE W. WHITE

UNITED STATES OF AMERICA,
Plaintiff,

v.

REUBEN STURMAN, *et al.*,
Defendants.

[Filed Mar. 20, 1989]

ORDER

IT IS HEREBY ORDERED:

The United States of America shall reimburse travel and subsistence expenses incurred by the defendants and one attorney for each defendant while attending depositions in Zurich, Switzerland, subject to the limitations set forth in the regulations governing official travel by employees of the Department of Justice.

/s/ George W. White
UNITED STATES DISTRICT
COURT JUDGE
March 20, 1989

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

REUBEN STURMAN, *et al.*,
Defendants.

Judge White
CR85-133

TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE HONORABLE GEORGE W. WHITE, JUDGE OF SAID COURT, ON TUESDAY, APRIL 25, 1989 COMMENCING AT 1:30 O'CLOCK P.M.

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* * * *

[7] THE COURT: Excuse me just a minute. Let's
[8] bring this to a close.

I said originally that the depositions may go forward. They still may go forward.

The next thing to decide after they go forward is you may argue whether or not you have been denied any rights or anything else, but they will go forward.

The Government will pay for the expense, as you said, and then we will decide whether or not you had any problems that would deny you some constitutional right in this case.

* * * *

[29] THE COURT: . . . I don't think I have to put in an order. You know what the Magistrate wants. You should be able to know what the Magistrate wants because he told you what he thinks the Magistrate wants, and you can contact the Magistrate on your [30] own.

MR. JIGGER: And so there is no misunderstanding from the parties, if they don't wish to follow the orders of the Magistrate, they do so at their own peril.

THE COURT: They do so at whatever I say.

MR. JIGGER: Exactly, your Honor.

THE COURT: If I feel the Magistrate has given you every right that you were entitled to, and that the testimony should be heard, then I'll make that decision.

But I'll reach that bridge when I get to it. Take advantage of everything you can take advantage of at this point. That's the only thing I can tell you.

* * * *

[35] MR. JIGGER: It's my understanding that the Swiss do not allow the Court Reporter. It will be taken down by a Swiss Court Reporter in German and then the transcript will be provided.

THE COURT: I understand that. But I want a Court Reporter over there in case counsel want to make a record through our Court Reporter later or during the proceedings or whatever, the official Court Reporter. I think that probably should be important to do.

* * * *

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR 85-133
JUDGE GEORGE W. WHITE

UNITED STATES OF AMERICA,
Plaintiff,

v.

REUBEN STURMAN, *et al.*,
Defendants.

[Filed May 4, 1989]

ORDER

On April 11, 1989, the Swiss Supreme Court denied all oppositions filed concerning the Swiss depositions previously ordered by this Court. In view of the need for these depositions, the trial scheduled for June 5, 1989 is continued until September 5, 1989; the Swiss depositions are scheduled before Magistrate Holdener in Zurich, Switzerland for the week of June 5-9, 1989.

With respect to the Swiss depositions:

1. All parties wishing to examine and/or cross-examine Messrs. Schlaeppi; Meier, Bruner, Perrelet, and Schmid shall be present at the proceedings conducted by Magistrate Holdener in Zurich on June 5-9, 1989;

2. All parties wishing to conduct direct examination (as opposed to cross-examination) of the witnesses shall

submit written questionnaires to Magistrate Holdener by May 22, 1989;

3. Each defendant shall provide to the government the names of all persons attending the depositions on his or her behalf by May 12, 1989 so as to enable the government to obtain the necessary travel authorizations and to enable the Swiss magistrate to reserve an appropriate facility;

4. Subject to the limitations set forth in paragraph 5, below, the government shall pay the travel and subsistence expenses incurred by the defendants and one attorney for each defendant and by a law clerk, court reporter, and interpreter designated by the Court;

5. All individuals attending the depositions at government expense are traveling on official government business and are subject to the terms and limitations set forth in the Federal Travel Regulations (FPMR 101-7), including, but not limited to, the requirements that individuals must fly on a United States flag carrier (Title 46, U.S.C. § 1517; FPMR 101-7, chapter 1-3.6), must fly at less than first-class rates (FPMR 101-7, chapter 1-3.3d(1)), and must fly on the government's contract carrier service (FPMR 101-7, Chapter 1.2.1c(1)(a)(i)). Individuals wishing to have the government pay their air transportation expenses in advance must submit to the government, by May 10, 1989, their dates of departure and return to enable the government to make the necessary arrangements. The government will then make the air reservations and purchase the airline tickets. Once the tickets are purchased, individuals may, at their own expense, upgrade the tickets for higher fare tickets with the contract carrier. Individuals wishing to purchase their own tickets may do so, but will receive reimbursement after returning from Switzerland only to the extent they comply with the requirements of FPMR 101-7. Meal and lodging expenses will be reimbursed by the govern-

ment after return from Switzerland at the maximum per diem rate applicable to official government travel to Zurich, Switzerland during the week of June 5-9, 1989. The government shall notify the parties of the applicable per diem rate for the week of June 5-9, 1989, as soon as the United States Department of State sets the rates for that week.

IT IS SO ORDERED.

/s/ George W. White
HONORABLE GEORGE W. WHITE
United States District Court Judge
May 4, 1989

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR85-133
HON. GEORGE W. WHITE

UNITED STATES OF AMERICA
Plaintiff

vs.

REUBEN STURMAN, *et al.*
Defendants

[Filed May 5, 1989]

ORDER

Pursuant to the Court's Order of May 4, 1989 concerning travel to Switzerland for depositions;

IT IS HEREBY ORDERED THAT the following persons are designated to travel to Switzerland on behalf of this Court: Jeffrey Lichtman, Law Clerk; Francine Salopek, Court Reporter; and Maria Neiden, Court Interpreter.

IT IS SO ORDERED.

/s/ George W. White
GEORGE W. WHITE
U.S. DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Criminal Action No. CR85-133

Judge George W. White
Cleveland, Ohio

UNITED STATES OF AMERICA,
Plaintiff,

vs.

REUBEN STURMAN, DAVID A. STURMAN and
RALPH L. LEVINE, *et al.*,
Defendants.

TRANSCRIPT OF PROCEEDINGS HAD BEFORE
THE HONORABLE GEORGE W. WHITE,
JUDGE OF SAID COURT, AND A JURY,

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* * * *

[4295] TUESDAY, OCTOBER 24, 1989, 9:30 A.M.

(The following proceedings were had out of the presence and hearing of the jury:)

THE COURT: Good morning. Be seated, please. As to the motion to suppress evidence obtained pursuant to the Swiss Assistance Treaty filed by David Sturman and joined by the defendant Mr. Levine, the Court will deny that motion under Article 37 of the Treaty entitled Review of Determinations.

It expressly provides that, "Any restriction imposed by the treaty upon the governments of the United States and Switzerland create no substantive rights enforceable by the defendants in this case."

And the Court feels that whether or not the United States government is observing its treaty obligations is an issue solely before the governments of the United States and Switzerland as to matters of international relations. Assuming that Article 37 does not bar the motion, however, the substantive provisions of Article 5, Section 2(B) of the Treaty independently defeat the motion in that the defendants are only charged in Count I of the indictment.

As to the motion to admit into evidence the deposition testimony of the four individuals who were deposed in Switzerland as filed by the government, the Court has reviewed the translations of those documents. We [4296] have listened to what counsel have told us took place in Switzerland.

It appears that counsel are right when they say that the court reporter that the Court sent over there was not permitted to take stenographic notes at least. I can understand there may have been some confusion about her even taking notes. However, the issue really to be decided is whether or not the procedure as followed by the magistrate over there comported with our constitutional provisions taking depositions, due process, Sixth Amendment and other constitutional rights.

And in looking at the law that has been referred to this Court concerning this matter, and in looking at the procedure that was followed in that, the Court finds that the defendants were entitled to be present there, they were entitled to have counsel there, counsel for the government were entitled to have questions read, and it appears to me that counsel for the defendants were entitled to submit questions to the magistrate for answers by the witnesses.

So it appears to me that the procedure that was used, that there was a right to confront witnesses that comports with due process and our constitutional guarantees.

Insofar as the oath taking, as I read the transcript here it appears that the witnesses who testified were [4297] expressly admonished to provide truthful information with respect to their observations and their knowledge in the matter, and they were also told that he who intentionally makes a false statement, that is knowingly and intentionally in a legal proceeding as a witness, expert witness, translator or interpreter, or who provides false evidence or false opinion or who translates incorrectly will be punished because of false evidence pursuant to Article 307, Section 1 of the Penal Code with a term of imprisonment of up to five years.

Even though in our system if we have someone take an oath, it appears to me this process accomplishes the kind of thing that is intended and therefore it is not infirmed [*sic*] because of this, because the process that is used whereby the magistrate poses the questions and makes a summary to the translator, that in itself does not make the process infirmed [*sic*] in my opinion.

It appears to me also—and I may be wrong about this—it appears to me, Mr. Murray, you were the only one asking questions.

MR. MURRAY: On the defense side.

THE COURT: Yes.

MR. MURRAY: Yes. That's correct, your Honor.

THE COURT: Is that correct?

[4298] MR. MURRAY: Not unlike what has occured in this courtroom.

THE COURT: Yes, I understand. Insofar as the objection raised by Mr. Murray concerning the identification of Mr. Sturman by one of the witnesses in which it appears that the witness was told to go to a particular table to see if he could identify Mr. Sturman, although the Court would not allow that in its courtroom, it appears to me when I see the number of people that were

present at that table, that does not cause a taint, in my opinion, in the identification.

As to the bias of the examining officer, I have looked at the transcript. I do not feel that defense has made a case of bias in this instance when I look at the questions that are propounded and the answers given, and it appears to me that again when I see that the defense were in the position to ask questions, and as I read the instructions of the magistrate before we started, it appears—and I won't read those; they are in the record—it appears to me that there was a sufficient chance for cross-examination and confrontation of witnesses.

It appears also to this Court that to rule otherwise—and also I want it known that I think the law, case law that I have read and I agree with it, each case [4299] has to stand on its own merits. But it would appear to me that with foreign jurisdictions that have certain restrictions, what have you, you would never be able to have needed testimony in some cases if you took a position otherwise.

For these reasons, the motion of the government to admit into evidence the deposition testimony will be granted subject to counsel being heard as to parts that you feel that are—you wish to raise objections to.

* * * *

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case Number: CR85-133

UNITED STATES OF AMERICA

v.

DAVID A. STURMAN

[Filed Feb. 15, 1990]

JUDGMENT IN A CRIMINAL CASE

Arthur Wells, Jr., Attorney for Defendant.

THE DEFENDANT ENTERED A PLEA OF:

[☐ guilty ☐ nolo contendere] as to count(s) .....
and ☒ not guilty as to count(s) 1 .....

THERE WAS A:

[☐ finding ☒ verdict] of guilty as to count(s) 1.

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Conspiracy to Defraud the U.S. Department of Treasury, Internal Revenue Service, in violation of 18 U.S.C. 371.

IT IS THE JUDGMENT OF THIS COURT THAT: Defendant is hereby committed to the custody of the Attorney General for a period of four (4) years. It is further ordered that the defendant is fined $10,000, which shall be paid within 30 days of the date of sentencing. It is further ordered that the defendant shall pay the costs of prosecution of this case the amount of $73,651.55

equally with codefendant Reuben Sturman. It is further ordered that the defendant shall remain on the same bond pending timely appeal.

* * * *

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

* * * *

February 12, 1990
Date of Imposition of Sentence

/s/ George W. White
Signature of Judicial Officer

GEORGE W. WHITE,
U.S. District Judge
Name and Title of Judicial Officer

February 15, 1990
Date

I hereby certify that this instrument is a true and correct copy of the original on file in my office.

Attest: James S. Guilas, *Clerk*
U.S. District Court
Northern District of Ohio

By: /s/ Barbara L. Bin
Deputy Clerk

APPENDIX J

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 90-3147/48/51/3750

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID A. STURMAN, *et al.*,
Defendants-Appellants.

[Filed Jan. 8, 1992]

ORDER

BEFORE: KENNEDY and MILBURN, Circuit Judges; and WILHOIT,* United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

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* Hon. Henry R. Wilhoit, Jr. sitting by designation from the Eastern District of Kentucky.

APPENDIX K

CONSTITUTIONAL AND OTHER PROVISIONS

I.

Article III of the Constitution provides in part:

> SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.
>
> SECTION 2. The judicial Power shall entend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . .
>
> The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

* * * *

II.

The Fifth Amendment to the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public

danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

III.

The Sixth Amendment to the Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

IV.

The Court Reporters Act, 28 U.S.C. § 753, provides in part:

Reporters

(a) Each district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands shall appoint one or more court reporters.

The number of reporters shall be determined by the Judicial Conference of the United States.

The qualifications of such reporters shall be determined by standards formulated by the Judicial Conference. Each reporter shall take an oath faithfully to perform the duties of his office.

Each such court, with the approval of the Director of the Administrative Office of the United States Courts, may appoint additional reporters for temporary service not exceeding three months, when there is more reporting work in the district than can be performed promptly by the authorized number of reporters and the urgency is so great as to render it impracticable to obtain the approval of the Judicial Conference.

If any such court and the Judicial Conference are of the opinion that it is in the public interest that the duties of reporter should be combined with those of any other employee of the court, the Judicial Conference may authorize such a combination and fix the salary for the performance of the duties combined.

(b) Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. The regulations promulgated pursuant to the preceding sentence shall prescribe the types of electronic sound recording or other means which may be used. Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as may be requested by any party to the proceeding.

The reporter or other individual designated to produce the record shall attach his official certificate to

the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.

The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court, including all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

(c) The reporters shall be subject to the supervision of the appointing court and the Judicial Conference in the performance of their duties, including dealings with parties requesting transcripts.

* * * *

V.

Rule 28 of the Federal Rules of Civil Procedure provides:

Persons Before Whom Depositions May Be Taken

(a) Within the United States. Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term officer as used in Rules 30, 31 and 32 includes a person appointed by the court or designated by the parties under Rule 29.

(b) In Foreign Countries. In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be

issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) Disqualification for Interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

VI.

Rule 30 of the Federal Rules of Civil Procedure provides:

Depositions Upon Oral Examination

(a) When Depositions May be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is

not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Notice of Examination: General Requirements; Special Notice; Non-Stenographic Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by the plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless the person's deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and the attorney's

signature constitutes a certification by the attorney that to the best of the attorney's knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when the party was served with notice under this subdivision (b)(2) the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at the party's own expense. Any objections under subdivision (c), any changes made by the witness, the witness' signature identifying the deposition as the witness' own or the statement of the officer that is required if the witness does not sign, as provided in subdivision (e), and the certification of the officer required by subdivision (f) shall be set forth in a writing to accompany a deposition recorded by non-stenographic means.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28(a), 37(a)(1), 37(b)(1) and 45(d), a deposition taken by telephone is taken in the district and the place where the deponent is to answer questions propounded to the deponent.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the depostion shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to Terminate or Limit Examination. At any time during the taking of the depositon, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope nad manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless

such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and Filing by Officer; Exhibits; Copies; Notice of Filing. (1) The officer shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. Unless otherwise ordered by the court, the officer shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition, and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person

may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the material may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that

party and that party's attorney in attending, including reasonable attorney's fees.

VII.

Rule 15 of the Federal Rules of Criminal Procedure provides:

Depositions

(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is detained pursuant to section 3144 of title 18, United States Code, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, un-

less, after being warned by the court that disruptive conduct will cause the defendant's removal from the place of the taking of the deposition, the defendant persists in conduct which is such as to justify exclusion from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but a failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) Payment of Expenses. Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and the defendant's attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.

(d) How Taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or the defendant's counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered and any party may offer other parts.

(f) Objections to Deposition Testimony. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.

(g) Deposition by Agreement Not Precluded. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.

VIII.

Rule 603 of the Federal Rules of Evidence provides:

Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

IX.

Rule 804 of the Federal Rules of Evidence provides:

Hearsay Exceptions: Declarant Unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, an-

cestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by the admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

X.

The Treaty between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, 27 U.S.T. 2019, T.I.A.S. 8302 (1973), provides in part:

Article 1

Obligation to Furnish Assistance

1. The Contracting Parties undertake to afford each other, in accordance with provisions of this Treaty, mutual assistance in:

a. investigations or court proceedings in respect of offenses the punishment of which falls or would fall within the jurisdiction of the judicial authorities of the requesting State or a state or canton thereof;

b. effecting the return to the requesting State, or a state or canton thereof, of any objects, articles or other property or assets belonging to it and obtained through such offenses;

c. proceedings concerning compensation for damages suffered by a person through unjustified detention as a result of action taken pursuant to this Treaty.

2. For the purposes of this Treaty, an offense in the requesting State is deemed to have been committed if there exists in that State a reasonable suspicion that acts have been committed which constitute the elements of that offense.

* * ** *

4. Assistance shall include, but not be limited to:

a. ascertaining the whereabouts and addresses of persons;

b. taking the testimony or statements of persons;

c. effecting the production or preservation of judicial and other documents, records, or articles of evidence;

d. service of judicial and administrative documents; and

e. authentication of documents.

* * * *

Article 4

Compulsory Measures

1. In executing a request, there shall be employed in the requested State only such compulsory measures as are provided in that State for investigations or proceedings in respect of offenses committed within its jurisdiction.

2. Such measures shall be employed, even if this is not explicitly mentioned in the request, but only if the acts described in the request contain the elements, other than intent or negligence, of an offense:

a. which would be punishable under the law in the requested State if committed within its jurisdiction and is listed in the Schedule; or

b. which is described in item 26 of the Schedule.

3. In the case of such an offense not listed in the Schedule, the Central Authority of the requested State shall determine whether the importance of the offense justifies the use of compulsory measures.

4. A decision as to whether the conditions of paragraph 2 have been met shall be made by the requested State only on the basis of its own law. Differences in technical designation and constituent elements added to establish jurisdiction shall be ignored. The Central Authority of the requested State may ignore other differences in constituent elements which do not affect the general character of the offense in that State.

5. In those cases where the conditions of paragraph 2 or 3 have not been met, assistance shall be granted

to the extent that it can be furnished without the use of compulsory measures.

* * * *

Article 9

General Provisions for Executing Requests

1. Except as otherwise provided in this Treaty, a request shall be executed in accordance with the usual procedure under the laws applicable for investigations or proceedings in the requested State with respect to offenses committed within its jurisdiction.

2. The requested State may, upon application by the requesting State, consent to apply the procedures applicable in that State for:

a. investigations or proceedings; and

b. certification and transmission of documents, records or articles of evidence;

to the extent that such procedures are not incompatible with the laws in the requested State. A search or seizure may only be made in accordance with the law of the place where the request is executed.

3. The appropriate judicial officers and other officials in each of the two States shall, by all legal means within their power, assist in the execution of requests from the other State.

* * * *

Article 12

Special Procedural Provisions

1. Upon express application of the requesting State that the testimony or statement of a person be under oath or affirmation, the requested State shall comply with such request even in the event no provisions therefor exist in its procedural laws. In that event, the time and form of the oath or affirmation

shall be governed by the procedural provisions applicable in the requesting State. Where an oath is incompatible with law, an affirmation may be substituted, even though an oath has been requested, and testimony or a statement so obtained shall be admitted in the requesting State as though given under oath.

2. The presence of the suspect or defendant, his counsel or both, at the execution of a request will be permitted whenever the requesting State so requests.

3. (a) Where the presence of representatives of an authority in the requesting State at the execution of a request is required by its law in order to obtain admissible evidence, the requested State shall permit such presence.

(b) Where the requested State agrees that the complexity of the matter involved or other special factors described in the request for assistance indicate that such presence in likely to substantially facilitate a successful prosecution, it shall also permit such presence.

(c) In other cases the requested State may also permit such presence upon application by the requesting State.

(d) Nevertheless, if such presence would result in providing to the United States facts which in Switzerland a bank is required to keep secret, or facts which are manufacturing or business secrets therein, Switzerland shall permit such presence only where the requirements for disclosure in paragraph 2 of Article 10 have been met.

(e) Switzerland may, furthermore, at any time in the course of the execution of a request, exclude such reprsentatives until it has been determined whether such requirements for disclosure are met.

4. Any person whose presence is permitted under paragraph 2 or 3 shall have, in accordance with the procedures in the requested State, the right to ask questions which are not improper under the laws of either State.

5. If in the requested State testimony or statements are sought in accordance with the procedures in the requesting State, persons giving such testimony or statements shall be entitled to retain counsel who may assist them during the proceeding. Such persons shall be expressly advised at the beginning of the proceeding of their right to counsel. After consent has been given by the Central Authority of the requesting State, counsel may be appointed, if necessary.

6. If the requesting State expressly requests that a verbatim transcript be taken, the executing authority shall make every effort to comply.

* * * *

Article 28

Central Authority

1. Requests for assistance shall be handled by a Central Authority. For the United States, the Central Authority shall be the Attorney General or his designee. For Switzerland, the Central Authority shall be the Division of Police of the Federal Department of Justice and Police in Bern.

2. Such requests which are approved by the Central Authority of the requesting State shall be made by that Authority on behalf of federal, state or cantonal courts or authorities which by law have been authorized to investigate or prosecute offenses.

3. The Central Authorities of the two States may communicate with each other directly for the purpose of carrying out the provisions of this Treaty.

* * * *

Article 38

Effect on Other Treaties and Municipal Laws

1. Whenever the procedures provided by this Treaty would facilitate assistance in criminal matters between the Contracting Parties under any other convention or under the law in the requested State, the procedure provided by this Treaty shall be used to furnish such assistance. Assistance and procedures provided by this Treaty shall be without prejudice to, and shall not prevent or restrict, any available under any other international convention or arrangement or under the municipal laws in the Contracting States.

2. This Treaty shall not prevent the Contracting Parties from conducting investigations and proceedings in criminal matters in accordance with their respective municipal laws.

3. The provisions of this Treaty shall take precedence over any inconsistent provisions of the municipal laws in the Contracting States.

* * * *

Article 40

Definition of Terms

1. In this Treaty:

   a. the terms "requesting State" and "requested State" shall be deemed to mean the United States of America or the Swiss Confederation, as the context requires;

   b. the term "state" or "states" shall be deemed to mean any one or more of the states of the United States of America, its territories and possessions, the District of Columbia and the Commonwealth of Puerto, as the context requires;

c. the term "canton" or "cantons" shall be deemed to mean any one or more of the cantons of the Swiss Confederation;

d. in any place where the word "in" precedes "requesting State" or "requested State", the phrase is used to refer to all of the territory under the jurisdiction of the United States including its states as defined in subparagraph b, and subdivisions thereof, or to the territory of Switzerland, including its cantons, as, and to the extent, the context requires; and

e. references to law or procedure in the requesting State or law or procedure to be used in executing requests, are, respectively, intended to refer to the law or procedure which is applicable to the investigation or proceeding being conducted or which would ordinarily be used in comparable investigations or proceedings by the authority executing the request.

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